The Practical

REGISTER,

Or the Accompliſh'd

ATTORNEY:

Conſiſting of

RULES, ORDERS, and the moſt Principal *OBSERVATIONS*

Concerning the Practice of the

COMMON-LAW

In His Majeſties Courts at *Weſtminſter.*

But moſt particularly applicable to the Proceedings in the *KINGS BENCH,* As well in Matters CRIMINAL as CIVIL.

By *William Style* of the *Inner-Temple* Eſq;

Alphabetically digeſted under ſeveral Titles, with a Table directing to the ready finding out of thoſe Titles.

The ſecond Edition very much enlarged.

Semper ego Auditor tantum, nunquamne reponam? Ju. 1. S.

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REGISTER

Or the Accomplish'd

ATTORNEY:

Guiding or

RULES, ORDERS, and [illegible]

Rec. Apr. 25, 1894

THE PREFACE TO THE READERS,

To whom it doth or may any ways concern.

MAny and frequent have been the clamours of some infatuated Spirits of this distempered Age, who (like the Devil, that arch Enemy to all good Government and Order) labour to bring all things into confusion; yea (if possible) into the Original Chaos, against the Common Laws of this Nation, and the practice thereof. I must confess their pretences, though they are as false as malicious, do yet seem specious and fair in appearance, and are too apt to take with the vulgar and ignorant; and no wonder, for they (*Athenian*-like) pleased with novel-

ties, and constant to nothing but inconstancy, are ever thirsting after change and alteration (though to the worse) as children long to vary their Sports, and shift their Toys and Baubles. It is true, that all Creatures (man only excepted) do observe the Rules of Nature, prescribed unto them in a constant and setled way, but he by his fall did lose that perfection, and hath (thereby) not only subjected the Creature, but himself to vanity and vexation of Spirit: this is not only true of man, in his *puris naturalibus*, but even of those whose Souls are heightned above the common pitch, by civil education, and good literature; yea even of Gods dear children who have those extraordinary Characters of his strength and goodness fixed upon them, and see things with a clearer light then meer Nature improved to the utmost can afford: So truly may that Ancient and common saying be applied to all, *mens humana novitatis avida*. That therefore many things are (oftentimes) disliked and inveighed against, even by well-meaning, and (otherwise) discreet men, is no sound conclusion, that they are naught, and fit, either to be abolished or reformed, but that mens minds are unsetled and restless, and not long to be satisfied with any thing, be it (in it self) never so excellent and desirable.

This

This truth is abundantly manifeſted by *Solomon*, the wiſeſt and greateſt of men of his age (if not of any ſince) in his Book called the Preacher, *c.* 1. and 2. Theſe things conſidered (though in my Judgment, who have for this ſix and thirty years laſt paſt and upwards, been a Student of the Common Laws, and for a great part of that time, carefully obſerved the general practice thereof; yea, I believe alſo of many more, far more ancient in time, and of far deeper judgments, and more eminent in parts then my ſelf) there is not to be found, either in the Laws themſelves, or in the practice thereof, any ſuch conſiderable inconveniences, or of ſuch dangerous conſequence as hath been, and yet is (by ſome) pretended; I do not think it ſtrange to have heard ſo loud crys, and calumnies, of late falſly voiced and Printed againſt them. Endeavours and expedients have been prudently ſtudyed, and warily put in practice, by the Grave and Learned Judges and Sages of this Nation, to give ſatisfaction unto, and to prevent greater miſchiefs (if poſſible) which might ariſe from the unſetledneſs of this *Nulli-legian* brood, by ordering and regulating as much as might be (without impairing the excellencies of the Laws themſelves, and the due and ready

administration of equal Justice) those things against which (they conceived) there was or could be any colour or shadow of exception; but how these men have been satisfied therewith, or whether the people have received (hereby) that general benefit, as was supposed, I leave to the Learned to judge, and to those that have made experience thereof. For my own part, I must confess I cannot yet conceive (always submitting to better Judgments) that our Common Laws, and the practice thereof, which are of so great antiquity, and have been from Age to Age to this present time refining and working into this model, and so happily continued, not only to the good and flourishing of this Nation in our own Country, but to the making of us (thereby) famous and renowned through the whole Christian World, can admit of a sudden alteration for the better, but do rather fear that experience will in time manifest (if it doth not already too much appear) that as great, if not greater inconveniences may fall out to the people by those alterations that have been already made, then there did usually happen before they were undertaken and put in practice: So difficult, nay so dangerous a thing it is on the sudden, and by the advice

vice of a few, though Learned and diſcreet men, to better that which hath been the ſtudy, and conſtant endeavour of many Ages to bring to that excellency, perfection, and beauty, in which the judicious, with joy and content, do behold it to appear. I ſpeak not this to reflect upon the Judgments or actions of thoſe that have aſſayed any thing in this kind, I know they are placed in many Orbes above me, and may ſee much further, and will therefore rather conclude my ſelf to be ſhort ſighted in apprehending, then ſay there hath been any miſtakes in the not right ſtating of things; Nor do I hope thereby to ſtop the clamorous mouths of the malicious and ignorant; for this would be as much folly, as *Surdo canere*, or to preſent colours to the blind to diſtinguiſh of; when their impudence is grown leſs, and their knowledge greater, it will be then (and not till then) a fit time to beſpeak them with reaſon, till when I leave them. But my deſire and intentions herein are in part to ſetle the wavering minds of ſuch, who though they are not over-ſwayed with a prejudicate opinion, or ſo much raiſed with ſelf-intereſt, to run clean beſide the fair mark of good Laws, Order and Government, may yet be unreſolved in their judgments, what

to determine concerning thoſe Laws and the practice thereof, which have been (of late) without any reſtraint, ſo much vilified and deſpiſed; And this is alſo one cauſe which moved me to give way to the publiſhing of this enſuing Treatiſe, that they may thereby receive information, not from me, but from the Oracles of the Law, the Grave and Learned Judges of the *Kings Bench*, and more particularly from the mouth of that upright, ſtout and poliſhed Pillar of the Law, the late Lord Chief Juſtice *ROLLE*, what the Law and the practice thereof is and hath been for theſe latter years, yea even at that very time, wherein they were ſo much, and ſo falſly clamoured againſt; wherein I doubt not but there may be found to be, by thoſe that will and can underſtand it, ſo much reaſon, and ſuch univerſal and impartial Juſtice in the Laws themſelves, and ſo much care and circumſpection, daily uſed in the general practice of them, for the equal and ſpeedy diſtribution thereof, that they ſhall not need a Champion to ſtand up in their vindication. As for thoſe miſcarriages which do ſometimes (and it may be too often) fall out in the retarding of Juſtice to the prejudice of the Clyents, I dare ſay, that they are uſually occaſioned, either by their own

negligence or wilfulneſs, and are not to be charged upon others; and for thoſe that do befal them other ways, either by the ignorance, or falſity of thoſe they intruſt, which ſo long as man is but man, may ſometimes be; you will find that they are no ſooner diſcovered and complained of in the right place, but they are rectified, and (if there be cauſe) the offences exemplarily puniſhed, and all poſſible care that may be (from time to time) taken to prevent and meet with the like inconveniences for the future; ſo far are and have been the Sages of the Law at all times from countenancing or tolerating any thing, that may ſtop or obſtruct the ſtream of Juſtice from flowing readily and indifferently to all. For the Book it ſelf, I cannot call it a perfect Work, you ſee I aver it to be no more then a few years Collections and Obſervations thereupon; and indeed they were only taken for private uſe, without any thoughts of making them publick, yet ſuch as it is, I conceive it may not altogether prove uſeleſs; for it being the firſt eſſay of this nature that I find endeavoured or put forth by any, it may, if it may nothing elſe, at leaſt encourage others hereafter, to make a further progreſs in this kind (now that the way is pointed at) then the ſhort ſpace of time,

allotted me to travel in, hath ſuffered me to do, and to adde heaps to my gleanings, and to nouriſh up this my Babe to ſuch a growth and perfection, that it may (happily) when I am gone, forget its firſt Parent, and own another name and Author, as I have known ſome Books to have done. It may alſo be (probably) ſome direction to thoſe that begin to practiſe at the Bar, but eſpecially in the Court of the *Kings Bench*; how to practiſe fairly, and with ingenuity, and to make motions, befitting the honour and wiſdom of the Court to grant, and may ſtand with modeſty and diſcretion, in relation to themſelves to move, and not frivolous and uſeleſs, yet chargeable to the Clyent; and though it be not worthy to be an Inſtructer to the long experienced, and ready practicer, to whom I preſume few things of this kind can prove new and unheard of; yet may it (perchance) at ſome time or other, be their remembrancer of thoſe things (though but ordinary) which multiplicity of buſineſs will not ſuffer them on the ſudden to call to mind; a thing which I have often obſerved to befal many able and well verſed practicers, and no wonder, for the beſt memories do often prove treacherous. I have made it my buſineſs to

obſerve with diligence, and to render with candor, not mine own, but the ſence of the Court in all things, and as near as I could in the very words they were delivered, yet many things being ſpoken *obiter*, and all men ſubject to miſ-apprehenſions, and my ſelf (it may be) as much as others; I will not labour, either to free the book (wholly) from errors, nor my ſelf from miſtakes, but leave both to the Readers candid conſtruction and cenſure. Thou maiſt perchance think it ſtrange that ſo ample a ſubject as the Title of the Book ſets forth, ſhould ſwell it to no bigger a volume; and alſo ask me why upon many of the heads in the Book, which in themſelves do afford ſuch copious matter, I am ſo brief and conciſe. For the firſt know, that my pretenſions are not (as thou mayeſt ſee in the very Title of the Book, and through the whole Book it ſelf, and which I have alſo already hinted unto thee) to give thee a compleat Collection of all things, belonging to each head, which I do find and have read, delivered *parſim* in our Books, but only the ſubſtance of ſuch things, which I have heard and taken with my own hand at the Bar for ſome years laſt paſt, much whereof, I am confident, thou canſt not find elſewhere in

Print,

Print, and this is also in the second place the true reason why upon some of the heads I am so short, which might have been expected, would have been far larger; for as things were (occasionally) from time to time delivered by the Court, so were they taken, and so are they offered unto thee, and not otherwise, saving my endeavours to explain some things which by reason of the short delivery of them, seemed more obscure then others, and that not only for the easier understanding of the younger Student, but also (if it were possible) to satisfie those great Antagonists of the Law and the practice thereof (who have need to have things made very plain and easie to them) how much they have been out of the way in their vilifying and labouring to destroy that which is so excellent in it self, and by which (next under God) we are not only continued to be a people, but are also rendred a peaceful and a flourishing Nation, and which I am confident, maugre the malice of those that wish and hope the contrary, will remain and flourish amongst us, until for our sins God shall say (which I hope in his mercy he will not) I have no pleasure in you, but shall suffer a Foreign enemy (as hath been heretofore done) to take away our

only our Laws and Liberties, but our Land and Nation. If any ſhall ſay that my own intereſt hath warmed my zeal to this temper, and renders what I have ſaid ſuſpicious of belief, I muſt anſwer them, that I am indeed of the profeſſion of the Law, and I am not aſhamed of it, for I believe it to be not only an honeſt, but an ingenious and honourable calling, and (in it ſelf) not mercenary, as it is by ſome ſaid to be, and too corruptly alſo ſo made by many others: but for the advantage I have hitherto made by it, or believe I ſhall ever do, in the way of profit, I might and may yet as eaſily be contented it ſhould be taken away as moſt, if not any of them, that cry ſo loudly againſt it; only (I believe) with this difference, I deſire to keep that little *Quelque choſe*, that I have of mine own, *pur faire bouillir la marmite*, as the *French* ſaying hath it, and with which, I am I thank God contented under the protection of the Laws, and they to get what they have not from others, *jure ſive injuria*, it matters them not, and that there may be no Law to check or puniſh their unbridled deſires and unlawful actions; did not then the enſuing Treatiſe abundantly prove the truth of that little I have ſaid in defence of our Laws and the practice thereof, I ſhould not doubt but my ſingle and bare

aver-

averment of a truth so well known unto many would sooner be believed, then their many foul calumnies, speaking their own interests, though in disguised and fair words and pretences. I shall say no more, but leave what I have said to thy judicious consideration, and the Book to thy serious perusal and favourable acceptance.

From my Study in the Paper buildings in the Inner-Temple.

William Style.

THE

THE TABLE.

A

Account. Page 58
Actions. 8
Accessory, vid. Principal
Addition. 42
Adjournment. 33
Administration. 34
Advantage. 52
Affidavit. 41
Affirmance. 45
Age. 52
Agreement. 45
Aid and Aid-Prayer. 60
Amendment, vid. Record. 17
Amercement. 29
Apparence. 38
Appeal. 51
Appurtenant and Appendant. 57
Argument. 59
Arraignment. 54

Arreſt, vid. *Judgment*. 36
Aſſize. 52
Aſſignment. 31
Aſſumpſit or Promiſe. 47
Attatchment. 25
Attorney, vid. *Warrant*. 1
Attornment. 47
Attaint. 55
Audita Querela. ibid.
Authority. 56
Auditor. 59
Averment. 32
Avowry. 33
Award. 43

B

Baron and Fem. 60
Bar in Actions. 62
Bail. 63
Bankrupt. 75
Bailiff. 76
Bargain and Sale. 77
Battery. 78
Bill. of Exchange ibid.
Book. 79
Breach. 79
Burglary. 79

C

Capias. 95
Causes. 112
Cessions. 110
Certiorari. 98
Certificate. 119
Chattel. 113
Chancery. 95
Challenge. ibid.
Church-Warden, vid. *Warden of a Church.*
Clerk. 120
Clergy. ibid.
Commitment. 110
Common and Commoner. 117
Compulsion 106
Commission and Commissioners. 109
Constable. 108
Contempt. 110
Condition. 112
Confirmation. ibid.
Contract. 114
Consideration. 116
Confession. 117
Conveyance 119
Copy. 118
Copy-hold and Copy-holder. 113
Corporation. 88
Costs and Charges. 89
Courts and their Jurisdictions, vid. *Jurisdictions.* 79
Covenant. 115
County. 108

Councel and Counceliour. 107
Croſt, vid. *Toſt.*
Cuſtoms. 104

D

Damages. 148
Debt. 157
Deeds. 164
Declaration. 141
Default. 156
Delivery. 121
Demand. 140
Demurrer. 125
Deniſon. 121
Deodands. 125
Depoſitions. 123
Deputies. 156
Departure. 120
Deviſe. 124
Difference. 122
Diſcretion. 123
Diſcharge. 133
Diſcontinuance. [redacted] 429. 137
Diſſeiſor. 136
Diſtreſs and Diſtringas. ibid.
Dower. 122
Duty. 148
Durſs. 463

Eject-

E

Ejectment and Ejector. 94: 94 165 229
Elegit. 212
Election. 192
Emparlance. 178
Enditment. 183
Entry. 204
Enrollment. 213
Error. 194
Eſcheater. 216
Eſcape. 215
Eſtate. 213
Eſſoigne. 212
Eſtople. 193
Evidence. 171
Examination. 206
Executor. 182
Expoſition. 191
Exemplification. 207
Execution. 208
Exception. 212
Exigent. 208
Extent. 216
Extingniſhment. 194

F

Faits, ſee Deeds.
False Impriſonment. 228
False Latin and Form. 221
Fees. 224

Fee Simple. 227
Felony 225
Feoffment. 228
Fine. 217
Filing of Proceſs, &c. 220
Fiction of Law. 229
Foundation. 228
Forma Pauperis. 221
Forfeitures. 222
Franchiſe. 223

G

Gavel kind. 229
Good Behaviour 230
Guardian. 229

H

Habeas Corpus 232
Habere facias poſſeſſionem. 236
Heir. 232
Heriot. ibid.
Homage. 236
Hundred. ibid.

J

Jeofails. 278
Impoſſibility. 280
Impropriation. ibid.
Imparlance vid. *Emparlance.*
Inditement vid. *Enditement.*

Insurgavit: See Office . . . 404
Infant and Infancy. 266
Information. 269
Injunction. ibid.
Intendment and Intentions. 278
Interrogatories. ibid.
Issue. 274
Issue. 242
Judges. . . 276 415
Judgment. 246
Jury. 237
Jurisdiction vid. Courts. 268
Justification. 267
Justice of Peace. 271
Inquiry of Damage v: Writt 558

L

Latitat. 376
Lease, Lessee. 370
Leet. 374
Liberty. 373
Limitation. 374
Livre vid. Book.
Livery and Seisin. 369
London. 375

M

Mistoubmanus . . . 429. 430.
Man-slaughter. 381
Mareschal. 376
Messuage. 381
Misrecital, vid. Recital.
Monstrance. 376

Motion to the Court, 377, 380
Mortgage. 381

N

Negative preignant. 398
Non-ſuite. 382
Nolle proſequi, 383
Nomine pœnæ. 384
Notice. 384, 397
Non omittas. 397
Nuſance. 383

O

Oath. 398
Obligation. 399
Office and Officer. 404
Orders. 402
Outlawry. 403
Oyer of a Deed, &c. 404

P

Paper Book. 405
Parliament. 457
Pariſh. 453
Partition. 439
Pardon. 425, and 431
Party and Privy. 451
Payment. 439
Peace, vid. *Juſtice of Peace*.
Penalty. 425

Perjury.	426
Peremptory.	459
Plaint.	456
Pleas and Pleading.	405
Plea.	424
Pledge.	431
Poor.	456
Poſtea.	433
Ports.	436
Poſſeſſion.	459
Practice.	442
Preſcription.	452
Preſentation.	454
Preſentment.	457
Preſidents.	ibid.
Preſumption.	436
Principal and Acceſſory.	454
Priſon and Priſoner.	458
Priviledge.	442
Proclamation.	460
Proof.	454
Prohibition.	446
Proceſs and Proceedings in Law.	426
Proviſo.	430
Procedendo.	440
Promiſe, ſee Aſſumpſit.	
Property.	437
Protection.	461
Purchaſe.	452

Q

Quashing of Endictments, Orders, &c. 462
Quo warranto. 463
Quare. ibid.

R

Record, vid. Amendment. 469
Recognizance. 487
Recovery. 489
Recital and Misrecital. 491
Reddidit se 493
Reference. 492
Rejoynder. 485
Relief. 474
Release. 490
Remainder. 485
Report. 491
Replication. 488
Replevin. ibid.
Repeal. 476
Request. 475
Rescous. 474
Restitution and Rerestitution. 478
Reservation. 489
Return of Writs, &c. 464
Reversal. 476
Revocation. 486
Reversion. 492
Right and Common Right. 493
Rolle. 487
Replication de Fraud Rule

Rule. 481
Ryot. 486

S

Satisfaction. 501
Scire facias. 494
Setlement. 507
Sessions, vid. *Cessions.*
Secondary. 507
Sheriff and Under-Sheriff. 503
Statute. 498
Suggestion or Surmise. 504
Supersedeas. 505
Surrender. ibid.
Surprisal. 507
Sd: Bare gnd 495

T

Tales. 528
Tenement. 523
Tenure. 532
Tender. ibid.
Terms. 529
Time. 525
Tipstaff. 524
Title. 522
Toft and Croft. 530
Traverse. 521
Treason. 525
Trespass. ibid.
Trover and Conversion. 530
Tryal and Proceedings to it. 503

Trust. 531
Tythes. 532

V

Valuation. 549
Variance. 550
Venue and Venire Facias. 533
Verdict. 541
View. 552
Vill. 551
Void and voidable ibid.
Use. 550
Usury. ibid.

W

Wager of Law. 560
Warden of a Church, or Church-Warden. 553
Warranty. 554
Waste. 553
Way and High-way. 559
Will. 572
Witness. 519 566
Whithernam. 554
Words. 562
Writ. 555
Writ of Enquiry of Damages. 558

Books

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THE

Practical Regiſter;

Or, The

Accomplish'd Atturney.

Atturney.

ONE appeared as Atturney for the Defendant without Warrant upon Record, and the Defendant ſaid in Court, That he made him not his Atturney, nor would admit him to be his Atturney; yet the Court admitted him and bid him put in his Warrant of Atturney, according to the name mentioned in the Record 28. *Aſſ. B. Record.* 45. 15. *H.* 7. 14.

Every Atturney of the Kings Bench, ought to attend in the Court at the ſecond return of the Term, by the Ancient Rules of the Court, for the quicker diſpatch of Juſtice to be done to the people; and for that reaſon, if they did not, they were to be put out of the Roll: and it was then Ordered by the Court, that the ancient Rules of the Court

for Regulating of the Atturnies in their practice, ſhould be renewed and ſet up in the Kings Bench Office, *Hill.* 21. *Car. Banc. Reg. For the Atturnies to take the better notice of them, and that they ſhould not plead ignorance, in caſe they ſhould tranſgreſs thoſe rules.*

An Attorney of either Bench, accepting a Warrant to him directed to appear for the Defendant or ſubſcribing the ſame, and do not cauſe an appearance to be entred accordingly, ſhall the next Term be compelled to enter his appearance of the precedent Term, and plead to Iſſue; or in Default of Pleading, Judgment to be entred by Default. Per Magiſtrum Liveſay, & alios Clericos Paſ. 21. Caroli prædicti Regis.

One may not repeal a Warrant of Atturney given to an Atturney to appear for him, to the intent to defraud the Plaintiff of his appearance, but the Atturney ought by the Rules of the Court to appear for him, according to the Rules of the Court, notwithſtanding his Warrant be ſo repealed, *Trin.* 22. *Car. B. R. But after ſuch appearance he may change his Atturney, if he have good cauſe to do it, and do it not in delay of his Proceedings; for the Law requires ſpeedy Juſtice to be done to all perſons.*

If an Atturney do practice deceitfully, an Attatchment lies againſt him out of this Court, at the prayer of the party grieved, if he make it appear to the Court, and good coſts ſhall be given againſt him, 22. *Car. B. r. For the Court hath authority to remove all Obſtructions that may hinder the equal Proceedings in Law, and to puniſh the Obſtructers, and to right the party injured thereby.*

An

An Atturney and his Clerk were both committed by the Court for entring things againſt expreſs Rules of the Court, after notice of thoſe Rules given them by the Atturney of the other ſide, 22. *Car. B. r. And worthily; for the doing of this was an apparent Contempt of the Court, which the Court is bound to maintain, and they were bound to yield their Obedience.*

One Atturney ought not to ſuffer another Atturney to practiſe in his name, by reaſon of the many inconveniencies that often happen to the Clyents by this means, 22. *Car. B. r.*

If an Atturney is put out of the Roll, and another Atturney ſuffers that Atturney to practiſe in his name, he ſhall be put out of the Roll likewiſe. *Per Hyde Ch. Juſt. Mich. 16. Car. 2. Regis.*

One *G. H.* an Atturney was ordered to be put out of the Roll of Atturnies, for entring a judgment againſt an expreſs Rule in Court, *Mich. Car.* 22. *B. r.* but it was not done.

The proper place for an Atturney General to ſit upon any ſpecial matters, wherein his attendance is required in Court, in matters Criminal, is under the Judges on the left hand of the Clerk of the Crown. But this is but upon ſpecial, ſolemn, and extraordinary occaſions; for uſually he ſits not there, but within the Bar in the face of the Court, *Mich.* 22. *Car. B. r.*

No under-Sheriff ought to be Atturney, for it is often the cauſe of encreaſing of Suits, and alſo a hindrance in diſpatch of Clyents cauſes, *Trin.* 23. *Car. B. r. By reaſon of his double Capacity, and Intereſt, and of his great power he may have in the County where he is ſuch an Officer.*

If the Atturney of the Plaintiff or Defendant do dye hanging the Suite, and the other party whoſe Atturney is dead, have notice given of it, and will not retain another Atturney to proſecute for him, the other party may proceed, and is not bound to hinder his Clyents cauſe for it. *For he is not bound to take notice of the Atturney's death, and is not to be hindred in his proceedings by reaſon of his Adverſaries obſtinacy and neglect. Mich. 23. Car. B. r.*

The Plaintiff or Defendant may not change his Atturney pending the Suite, without leave of the Court, *Mich. 33. Car. B. r. For the changing of his Atturney, may reflect upon the Credit of his Atturney, in relation to his Practice, which the Law is tender of; and it may alſo prove prejudicial to the other party, by not underſtanding of this change, Mich. 14. Car.*

Alſo the Atturney ought to be ſatisfied his Fees, before any other ſhall be admitted to proceed in the Cauſe, in which another was formerly reteined as Atturney.

It was the old courſe in proceeding in an Action of Treſpaſs and Ejectment, to deliver the Leaſe of Ejectment to the party to whom the Plaintiff had made a Letter of Atturney to execute the Leaſe, and for the Atturney to deliver poſſeſſion of the Land upon the delivery of the Leaſe, *Paſ. 24. Car. reg. But now that way of practice is diſuſed, and the Leſſee of the Land ſends a Declaration to the Ejector, and the Ejector gives notice thereof to the Tenant in Poſſeſſion to defend the Title; or if a Declaration is delivered by a ſtranger to the Tenant in poſſeſſion, it is ſufficient.*

If one have a Letter of Atturney to deliver a Deed to another, and alſo authority from the party

by

by word of mouth to do it, he may make uſe of which of theſe he will to do it by, but not of both for the firſt that he makes uſe of ſhall be effectual, and the other ſhall be void, *Paſc.* 24. *Car. B. r. For the Law will not warrant unneceſſary and ſuperfluous Acts, and when a Deed is once well executed, all ſubſequent Acts in order to the execution thereof are of no force or validity in Law.*

An Infant ought not to appear to an Action by an Attorney, but by his Guardian; for he cannot retain an Atturney, but the Court may aſſign him a Guardian, *Paſc.* 24 *Car. B. r. For the Law doth take Infants and their Eſtates into protection; and will not ſuffer them to do any act which may be prejudicial to either; yet on the other ſide, the Law will not protect them to do wrong: and therefore if there be cauſe, will aſſign them Guardians to anſwer for them, and make ſatisfaction out of their Eſtates.*

The Atturneys ought to be ordered in the ordinary manner of their practice, by the Maſter of the Office, and if difference ariſe between them concerning it, he is to hear both parties, and to order the matters in difference betwixt them, and they are to ſubmit to him, *Paſc.* 24. *Car. B. r.* and the Court is not to be troubled but in extraordinary and difficult matters of proceeding.

If there be divers Defendants declared againſt in one Declaration, the Atturney in the cauſe on the Defendants part, cannot be compelled to appear for more of the Defendants; than for thoſe from whom he had warrant to appear, 24. *Car. B. r. For the Defendants Caſes may be different, although the Plaintiff declare againſt them joyntly, and each of them hath liberty to make choice of what Atturney he pleaſeth,*

and to Defend himself as he shall be best advised.

If one retain one by Warrant to be his Atturney in a Suite depending against him in this Court, he may appear for him by that Warrant in all Suites which are there depending against him. So that Declarations be filed in the Office, or delivered to the Atturney before the end of the same Term his bayle is filed. Note this is in case of a Common Bayle, but it is otherwise in case of a Special Bayle. *Hill. 1649. B. Sup. For the Defendant being, after his appearance and bayle put in, supposed to be* in Custodia Marischalli, *the Atturney that appears for him is bound to receive any Declaration that is brought against him; for one in prison may be charged with any action brought against him by any person.*

Atturneys ought to be of some Inns of Court or Inn of *Chancery*, and not to lodge in Inns or Alehouses, or in Private places, By *Rol* chief Justice, *Hill. 1649. B. Sup. 8. Feb. For it is not for the honour of the Law, nor for their credits to lodge in obscure places, but to live in Societies, where Order and Government is: and were this observed, much foul Practice would be hindred.*

Atturneys of the Kings Bench, ought to be allowed in all Circuits as the Atturnies of the Common Pleas are, although it hath been denyed them in the Western Circuit, and ought not to be compelled to pay extraordinary Fees for practising there, *per Rolle Pasc. 1650. 1. Mich. For they are equally Atturneys for the good and ease of the people with the Atturneys of the Common Pleas, and therefore it is reason they should be equally privileged. vid. 1. H. 7. f. 12. a.* that the Atturneys of the Kings Bench are not Atturneys upon Record, *Ergo quære.*

An

An Action upon the Caſe lyes for the Clyent againſt his Atturney, if he plead a plea for him, for which he hath not his Warrant. *Hill.* 49. *B. Sup. And ſo it is if he appear for him without a Warrant; for he may be damnified by his Appearance, as well as he may by his Pleading for him.*

The Atturneys of this Court were ordered from henceforth to be ſworn as the Atturneys of the Common Pleas are, by *Rolle Paſc.* 1650. 1. *Maii. B. Sup. This was a good proviſion for the people, to make the Atturneys the more Conſcientious and Careful in their Clyents buſineſs.*

One cannot force an Atturney to be his Atturney againſt his will, by *Rolle Chief Juſtic. But Q. whether it be alſo ſo in the Common Pleas, and whether in Caſe all the Atturneys ſhould refuſe, whether the Court be not bound to aſſign the party an Atturney.*

One may be an Atturney for a Clyent upon Record, and yet another Atturney may act all the buſineſs for this Clyent. *But the Atturney upon Record, is the Atturney that the Law takes notice of.*

An Atturney that hath Warrant to appear for his Clyent, may plead for him without another Warrant, by *Rolle Chief Juſtice. Sed Q.* for divers Clerks in Court ſaid privately that he cannot plead no other Plea for his Clyent without a ſpecial Warrant, but a *non ſum informatus. And this ſeems but reaſonable. for were it ſo that he might plead any other Plea, he might prejudice his Clyent againſt his will.*

In the Caſe of one *Boyle* and *Scarborough*, *Paſc.* 1656. *B. S. Glyn* Chief Juſtice commanded a Rule to be made, and ſet up in the Office, that none ſhall entertain an Atturney in a Cauſe where an Attur-

ney is formerly retained, without firſt acquainting the Atturney that was firſt entertained, or the Secondary in the Office, upon pain of 5. l.

If an Atturney dye pending his Clyents cauſe, his Warrant of Atturney is determined, and his Clerk may not proceed in the Suite without another Warrant, by *Rolle Chief Juſtice. For the Atturneys Clerk is not truſted by the Clyent, but the Maſter, and by his death the truſt is determined.*

By *Glyn* Chief Juſtice, it is againſt the Rules of the Common Pleas, and againſt the new Rules of this Court for one to change his Atturney in a Suite. *Paſc. 1656. B. S.*

An Atturney ſhall not have his Priviledge in an Action brought by himſelf and his Wife; becauſe as to the wife, the proceedings are *coram non Judice. M.* 23. *Car.* and ſo is *Powles* Caſe in *Dyer.*

But where an Atturney brought an Action as Executor, although it was *in Aver droit*, yet held good after a Verdict, *Trin.* 1654.

In the Caſe of *Ridley* and *Carr Paſc.* 1656. *B. S.* It was ſaid by *Glyn* Chief Juſtice, That by the new Rules, if an Atturney of this Court do abſent himſelf from the Court, and not give his attendance for a whole year together, he loſes his Priviledge, and ſo was it ruled in this Caſe.

Actions.

There ought to be both apparent malice in the Defendant, and prejudice alſo done to the Plaintiff to ground an Action upon the Caſe upon, or elſe it will not lye; for if there be only malice and no dammage done by it, there can be nothing recovered, and ſo the

the Action will be vain and to no purpoſe; and if there be only dammage and no malice, it is but *damnum ſine injuria*, and not puniſhable by Law, *Hill.* 21. *Car. B.r. For the Law doth not countenance Actions which can give no remedy to the party that brings them, nor will admit men to be vexed by Suites, where it is apparent they did no injury.*

Where there are two ſeveral dammages done to the party, he ought to have two ſeveral Actions, and not to joyn them in one Action. Entred *rot.* 156. 20. *Car. Hill.* 21. *Car. B.r. For this would make confuſion in the proceedings, and hinder the diſpatch of Juſtice.*

Although dammage without wrong will not maintain an Action, nor malice without dammage, yet malice may aggravate the dammages recoverable, where there is dammage and wrong meeting together, *Hill.* 21. *Car. B.r. For though the Law is tender in the puniſhment of thoſe that offend out of infirmity of nature; yet it looks upon malicious offenders as dangerous and deſtructive to the Common ſafety, and doth puniſh ſuch ſeverely.*

Where two Actions, though of ſeveral natures do depend one upon the other, the abatement of one of the Actions is the abatement of both, *Hill.* 21. *Car. B. r. For though the Actions be of ſeveral natures, yet having dependency one upon the other, they muſt be jointly proceeded in; and ſo if one fail, the other muſt needs fail.*

In an Action upon the Caſe, grounded upon a promiſe; the Declaration is *Actio ſuper caſum* in the ſingular number, although the Action be brought upon divers promiſes, for the word Caſe includes all, 21. *Car. B.r. becauſe it is* nomen collectivum, *and takes in all particulars belonging to the cauſe of Action.*

An Action brought againſt a Conſtable for a thing done by him by vertue of his Office, ought by the Statute to be brought againſt him in the County where he is Conſtable, and not elſewhere, 21. *Car B. r. And that upon great reaſon, for publick Miniſters of Juſtice are favoured in Law; and though by Law they are reſponſible for miſdemeanours in their Office, yet the Law provides that they be not put to greater trouble than need requires for their neceſſary Defence.*

A Tranſitory Action may be laid in any County at the will of the Plaintiff, yet generally (and it ſeems the better and more indifferent courſe ſo to do) it uſeth to be laid in that County where the cauſe of Action did firſt ariſe, *Mich.* 22. *Car. B. r. For the Law intends, that there the beſt Conuſance of the Cauſes of Action may be had, and conſequently the cleareſt Tryal.*

But when there is a tort or cauſe of Action in two Counties, 'tis at the Plaintiffs Election to lay the Action in which County he pleaſeth, *Evone verſus Theobald, Mich.* 18. *Car.* 2. *Reg.*

Tranſitory Actions ought not to be brought within Corporations, for their priviledges do properly and only extend for the tryal of ſuch Actions, the cauſes whereof do ariſe within their own juriſdictions, *Mich.* 22. *Car. B. r. And they ought not by colour of their particular Juriſdictions entrench upon the Common Law, but keep themſelves within their own bounds.*

Either an Action upon the Caſe, or an Action of Detinue at the Election of the Plaintiff may be brought for goods detained from him, 22. *Car. B. r. For it is but juſtice that the party ſhould recover his goods deteined* in Specie, *if they may be had; or elſe damages ſuſteined for deteining them at his Election; for the Defendant is not injured thereby.*

An

An Action of Trover and Converſion, is in its nature but an Action upon the Caſe to recover damages, *Mich.* 22. *Car. B. r. and is not brought to recover the goods* in Specie.

An Action upon the Caſe, doth lye by the Statute againſt the Court of Admiralty, for holding Plea of matter which is not within their Juriſdiction, *Mich.* 22. *Car. B. r. And juſtly, for every Juriſdiction ought to be kept within its own bounds, and if any one be injured by tranſgreſſing herein the Common Law will relieve the party injured thereby, and cauſe ſatisfaction to be made for this injury.*

Where a promiſe is made by a Fem Covert, or by a Servant, for the Husband or the Maſter, the Action for breach of this promiſe ought to be brought againſt the Husband or the Maſter; for it is their promiſe, and the Wife and the Servant are but inſtruments, *Mich.* 22. *Car. B. r. and are to receive no advantage or diſadvantage thereby, but the Husband and the Maſter.*

An Action upon the Caſe doth lye againſt one for ſpeaking ſuch words falſly and maliciouſly of another as if they were truly ſpoken of the party, he might be puniſhed as a Felon, or by ſome Statute fined or impriſoned, *Mich.* 22. *Car. B. r.* as for calling him Thief, &c. *For although the words be not true, yet the party of whom they are ſpoken is defamed thereby, and may perchance be proſecuted as a malefactor by reaſon of the words ſpoken.*

There is a difference betwixt bringing of an Action, and the laying of an Action, *Mich.* 22. *Car. B r.*

It is cauſe ſufficient to ground an Action upon the Caſe for one to put another to the trouble and charges to ſue for that which is his own, *Mich.* 22.

Car.

Car. B. r. For there the party is put to unneceſſary trouble and charge, and is damnified thereby; and it is reaſon he ſhould be repaired.

The cauſe for bringing an Action upon the Caſe for the ſpeaking of words againſt one, is the temporal loſs or dammage which may accrew to the party againſt whom they are ſpoken, by the ſpeaking of them, and not the words themſelves, *Mich. 22. Car. B. r. For the Law regards not words no further than they may tend to the dammage of another, either in his perſon or his eſtate.*

An Action upon the Caſe doth lie for ſpeaking of words againſt a man, by reaſon of which he loſt his marriage, *Mich. 22. Car. B. r. For thereby he may perchance receive dammage in reſpect of the increaſe of his Eſtate, and other Comforts of marriage probably expected by the marriage, had it not been hindred by ſpeaking of the words.*

An Action upon the Caſe doth not lie for arrerages of Rent due upon a Leaſe for years, becauſe the Law gives a proper Action for it, to wit, an Action of Debt, *Mich. 23. Car. B. r. Yet in ſome Caſe one may have an Action upon the Caſe where he may have another Action, as in the enſuing Caſe.*

Upon a promiſe made upon an *inſimul computaverunt*, the party to whom the promiſe is made, may either have an Action of Debt, or an Action upon the Caſe at his Election, for the thing which was before in diſpute and uncertain, is by the account and promiſe reduced to a certainty, *Mich. 22. Car. B. r. The Action upon the Caſe lies upon the breach of the promiſe, and the Action of Debt lies for the ſum which is reduced to a certainty, by the ſtating of the Accompt.*

For

For a Debt certain, referred amongſt other things to an Arbitration, an Action of Debt doth not lie, but an Action upon the Caſe, *Mich.* 22. *Car. B. r. For the referring it to Arbitration, amongſt other things makes it uncertain; and an Action of Debt lies not for an incertain ſum.*

It is not ſafe to be too particular or over curious in the laying of an Action, for it is often times a cauſe that the Action doth fail, *Hill.* 22. *Car. B. r. For by ſuch Curioſity the Plaintiff gives the Defendant the more advantage in pleading.*

An Action upon the Caſe lies for calling one Whore in *London*, but this is by the ſpecial Cuſtom of the City, *Hill.* 22. *Car. B. r.* yet 24. *Car. Paſc.* The Court was divided in opinion in this queſtion, whether an Action doth lie or not. *Ideo Q.*

An Action upon the Caſe lies for a private *nuſance*, but not for a publick, *Paſc.* 23. *Car. B. r. but an Endiſment, becauſe the Common-wealth is concerned in which all private Intereſts are included.*

An Action upon the Caſe doth lie for ſcandal or for moleſtation, *Paſc.* 23. *Car. B. r. For in both Caſes there may be* damnum *and* injuria.

Three bring an Action Joyntment for calling of them Coyners, and held that it doth not lie joyntly but ſeverally, *Fiſhes*, 17. *Hill.* 33. *Eliz.* in *Ban. reg.*

Where a Joynt Action doth lie againſt divers perſons of whom ſome are known to the Plaintiff, and the reſt are not known unto him, the Action may be brought againſt them that are known by their particular names, and againſt them that are not known generally, with a *ſimul cum aliis*, &c. *Paſc. Car. B. r. Eliz. as to charge them that are known, but not the parties not named.*

In

In a tryal upon a Treſpaſs and Ejectment, or a R
plevin touching the Title of the Land in queſtion, a
though the Verdict paſs againſt the Plaintiff; y
he may bring a new Action for the ſame Lan
for ſuch tryals are not final, *Paſc.* 23. *Car. B. r.* b
cauſe the Land is not recovered in them, but t
poſſeſſion only which he had at the time of Ejectme
made.

In a Caſe betwixt one *Nichols* and *Webb* in th
Common pleas for calling the Plaintiff (being an A
turney at Law) Knave, a Verdict and Judgment w
given for him; and this judgment being afterwar
removed by a Writ of Error into this Court; th
Judgment was affirmed, entred, *Trin.* 12. *Car. Rot.* 10
Paſc. 23. *Car. B. r. But the words muſt be laid to*
ſpoken in relation to his Profeſſion, or elſe they will not
Actionable.

An Action brought for Rent or breach of Cov
nant upon a Leaſe, may be laid either in the Coun
where the Leaſe was made, or in the County whe
the Lands do lie, that are let by Leaſe, *Paſc.* 2
Car. B. r. For the Actions ſound in the realty th
ſpect of the Lands for which the Rent was to be paid,
concerning which the Covenant was made; and ſo a
not Tranſitory.

Vexatious Actions are not favoured in Law, no
by the Court, but may be referred to the Maſter of th
Office to conſider of them, *Trin.* 23. *Car. B. r. P*
to favour Vexatious ſuits, is a great Injuſtice whi
the Law that is to do indifferent Juſtice to all, cann
be guilty of.

A violent intendment may bring one within th
compaſs of an Action, *Mich.* 23. *Car. B. r.* by *Rol*
Q. tamen in what Caſes.

On

One may in ſome Caſe bring an Action at the Common Law, for that for which he may alſo have his remedy in the Eccleſiaſtical Court; for the Common Law is to be preferred before the Eccleſiaſtical Law, where they ſtand in equal degree in reſpect of the matter to be tryed, *Mich.* 23. *Car. B. r. And therefore in ſuch Caſe it is not reaſon that the Plaintiff be barr'd from his Election.*

By a ſpecial cuſtom an Action doth lie in ſome Caſes in which at the Common Law no Action doth lie, and ſo was it adjudged, 8. and 13. *Car. Mich.* 23. *Car. B. r. And yet ſuch Action is not againſt the Common Law; for the ſpecial cuſtom of the place, is the Law of that place where it is uſed.*

The Kings Charter cannot enable the Patentee to bring an Action which the Common Law allows not, *Mich.* 23. *Car. B. r. For the King cannot alter the Common Laws, or the Proceedings thereof by Charter; for this were to uſurp upon the peoples birth-right.*

If one bring an Action upon the Caſe for divers words ſpoken, whereof ſome are Actionable and ſome of them are not, yet the Action lies, *Trin.* 24. *Car. B. r. But for them that are Actionable, and as to them only, dammages ſhall be given, if it paſs for the Plaintiff.*

The Husband may bring an Action alone for ſcandalous words ſpoken againſt him and his Wife, and recover, and yet may afterwards bring another Action for to recover dammages done to his Wife, by the ſpeaking of the ſame words, *Trin.* 24. *Car. B. r.* for the Husband & Wife are both particularly damnified by the ſpeaking of the words. *And this ſhall not be ſaid to be a double vexation.*

An

An Action upon the Caſe doth not lie upon a contract which ſounds in the realty but an Action of covenant: *Q.* if the contract be mixt with other matters which are not in the realty, whether it will then lie or no? *Mich.* 24. *Car. B. r.*

If one take out a Latitat within the time limited by the Statute for the limitation of Actions; it is a good bringing of the Action in due time, and he is not barred by the Statute, although he do not declare againſt the party within the time limited by the Statute, *Mich.* 1649. *B. S. For the taking out the Writ of Latitat, is in the nature of filing an Original, and by doing it, the Suite is commenced within the meaning of the Statute.*

An Action of the Caſe doth lie againſt one that doth Arreſt another without cauſe, *Paſc.* 1650. 6. *Mar. B. Sup. For there is* damnum & injuria *to the party arreſted by the doing of it.*

One may have an Action upon the Caſe againſt a Witneſs that is ſerved with a *Subpœna* to appear at a tryal and doth not appear by the Statutes of 5. *Eliz. C.* 19. 29. *Eliz. C.* 5. by which 10. *l.* forfeiture is given to the party injured thereby; and ſuch other ſatisfaction, as the Court out of which the proceſs iſſued ſhall think meet, *Paſc.* 1650. *B. S.* 18. *Maii. & 13 Nov.*

A Joint Action of the Caſe doth not lie againſt two ſeveral perſons for ſpeaking the ſame ſcandalous words, for the words of one are not the words of the other, but they muſt be ſeverally ſpoken, and conſequently ſeveral Actions ought to be brought againſt them, but a Joynt Endictment doth lie in ſuch a Caſe, and alſo a ſeveral Endictment at the Election of the Proſecutor 27. *Jan.* 1650. *B. S.* So ruled by the Court.

On

One may joyn two Debts due upon two ſeveral Obligations in one Action, and ſo it is of other perſonal Actions which are of the ſame nature, but it cannot be done in real Actions, in regard of the different natures of them, and the ſeveral kinds of defence may be made in them. *6. Feb.* 1650. *B. Sup.*

If a Carriers ſervant or his ſon conſpire to rob the Carrier, and do rob him, the Carrier not being privy to the conſpiracy; an Action will lie for the Carrier againſt the Hundred, where he was robbed, upon the Statute of *Wincheſter*: but this matter may be urged to the Jury upon the tryal in mitigation of dammages, by *Rolle Chief Juſtice. For it is all one as if a ſtranger had robbed him, as to the fact done, but as to the dammages he is to recover, it is not reaſon they ſhould be ſo great, being cauſed by perſons ſo nearly related to him.*

Amendment.

By *Glyn Chief Juſtice, Paſc.* 1657. *B.S.* After a Plea is put in unto a Declaration, the declaration ought not to be Amended by the conſent of the Atturneys on both ſides, without the leave of the Court, though it be but in things immaterial, and not of ſubſtance, for the Court only is to order and regulate all the proceedings in Law which are there depending.

That the Plaintiff may amend his Declaration in matter of form after a general iſſue pleaded before entry, without paying coſts, or giving Imparlance, but if he amēd in ſubſtāce, thē he muſt pay coſts, or giue imparlāce at his electiō, but if he amēd after a ſpecial

Plea pleaded, then he must pay, although he would give imparlance, Pasc. 21. Caroli secundi Regis, per Magistrum Livesay, & alios Clericos.

Nota: In all Rules where there is mention made of payment of Costs; the intent of the Rule is, to pay such costs as the Secondary shall tax.

That the Plaintiff may amend his Bill upon the File, at any time before the Plea pleaded, but not afterwards without motion of Court, Pasc. 21. Caroli secundi Regis, per Magistrum Livesay, & alios Clericos,

Original Writs are not amendable at the Common Law, for if the Writ be not good, the party may have another, *Hill.* 22. *Car. B.r. And it is dangerous to alter the foundation of things.*

The leaving out of the Atturneys name in the Imparlance Roll is Amendable upon a motion made to the Court to have leave to do it, but not without leave of the Court; so that the Atturneys name be not left out in the Issue Roll, for then it is not Amendable, *Hill.* 21. *Car. B.r. When the Issue Roll is made up, then the Record is a perfect Record, and is ought not to be amended in that part, for this would be to alter the Issue.*

If in a Replevin the Avowant do Amend his Avowry before the Term, and do pay costs, the Plaintiff ought to reply the next Term following, but if he pay not costs, he is not bound to reply the next Term, 21. *Car. B.r. For by accepting of costs, he hath dispensed with the fault in pleading, which was amended,*

and

and ſo he ought not to delay the other party, by taking advantage to delay the party by reaſon of the amendment.

Any fault in pleading which would be Amendable if the cauſe were depending in an inferiour Court, may be Amended where the cauſe depends in a ſuperiour Court, but not *è contra*, 21. *Car. B. r. For Inferiour Courts are preciſely to keep their forms in Pleading; and if they err, this Court will not ſuffer them in many Caſes to Amend their pleadings.*

Where two ſeveral perſons joyn in one Declaration, and one of them die pending the Suite, the Declaration cannot be Amended, but the other party that ſurvives muſt have a new Writ; for there is a great difference betwixt a Joynt Action and a ſeveral, *Trin.* 22. *Car. B. r. For it may be, the cauſe of Action doth not ſurvive; and ſo the death of one of the Plaintiffs doth abate the Writ, and where the Writ is abated, the Declaration is not Amendable.*

A Plea may be Amended upon giving of notice thereof to the other party, and paying of coſts, if the Plea be only entered in Paper, but if it be entered in Parchment, it cannot be Amended, for then it is a Plea upon Record, *Mich.* 22. *Car. B. r. And Records ought not to be amended in material things, ſuch as a Plea is, for this would be to make it another Record.*

The Court of the Kings Bench will not Amend a Tranſcript of a Record removed thither by a Writ of Error out of an inferiour Court, but they will Amend a Record removed thither out of the Common Pleas, if they ſee cauſe, *Mich.* 22. *Car. B. r. For if they ſhould, this would beget much trouble to this Court, which the dignity of this Court will not ſuffer.*

If the Plaintiff deſire to alter his Declaration, it is in the election of the Defendant to take coſts of the Plaintiff, and to let him Amend his Declaration, or to refuſe to take his coſts, and to Imparle the next Term, 22. *Car. B. r.* and 1650. *B. S. For in ſo doing, the Defendant is at no prejudice by the Amendment; for if he will, he may emparle to adviſe upon a Plea, fitting the Declaration ſo amended, or if there be no cauſe offered by the Amendment for him to adviſe, then he may take the coſts and plead.*

A Return upon a *Habeas Corpus*, or upon a *certiorari* to remove Orders of Seſſions of the Peace, *&c.* cannot be amended the Term after the Return is made, but it may be amended the ſame Term in which it is made, *Hill.* 22. *Car. B. r. For the Term after the Return, they ſhall be intended to be filed, and upon Record; but the ſame Term they are returned, is uſually given by the Court, to amend and make ſuch returns perfect if they be erroneous, and this is in favour of the Common wealth.*

The Clerk of the Peace may amend an Endictment removed into this Court at any time, during the Term in which it came in here, but afterwards it cannot be Amended, *Hill.* 23. *Car. B. r. for the ſame reaſons as aboveſaid.*

The Plaintiff may Amend his Declaration though it be ſeven years paſt ſince he Declared, if it be but in Paper, *Hill.* 23. *Car. B. r. paying coſts, or ſuffering the Defendant to Emparle till the next Term after; for the Defendant is no more prejudiced thereby, notwithſtanding the antiquitie of the Declaration, than if the Declaration were but of the Term next preceeding.*

If the Plea Roll be rightly entred, though the *Poſtea* be miſtaken in the tranſcribing of it, yet the *Poſtea* may

may be Amended, *Paſc.* 24. *Car. B. r. For the* Poſtea *is made up by the Clerk of the Aſſizes, and is guarded by the Plea Roll, but the Plea Roll cannot be Amended.*

A Declaration grounded upon an Original Writ if it be erroneous cannot be Amended, but if it be upon a Latitat or Bill of *Middleſex*, it may be amended, *Paſc.* 24. *Car. B. r. Becauſe the Writ upon which it is grounded, if it be erroneous is not Amendable, and ſo it ſuppoſed the Writ was erroneous. But a Declaration in the Kings Bench is not grounded on the* Latitat, *or Bill of* Middleſex, *for the Plaintiff is at large to declare as he pleaſeth.*

If a Tranſcript of a Record removed out of the Common Pleas Court, be to be Amended here, the Clerk in the Common Pleas is to bring in the Original Record out of Common Pleas into this Court, that the Tranſcript may be here Amended by the Record it ſelf, *Trin.* 24. *Car. B. r. For every Court will only truſt their own Officers, with the Records of their Court who are accountable to them for their actions, and are puniſhable by them for their miſdemeanours, and with ſuch perſons Records are only to be truſted.*

The Clerk of the Aſſizes may Amend the *Poſtea* by his Notes, if it be miſtaken, after that he hath returned it into this Court, *Trin.* 24. *Car. B. r. For ſuch faults ſhall be ſaid to be but* vitium ſcriptionis, *and not the errors of the parties.*

An Indictment removed into this Court may be Amended the ſame Term it came in, but not afterwards but upon ſome extraordinary matter, *Paſc.* 24. *Car. B. r. And to avoid ſome extraordinary miſchief which cannot be otherwiſe remedied.*

After

After the parties have joyned in Demurrer; the Demurrer may be amended if it be put in Paper, *Paſc. 24. Car. B.r. by the leave of the Court, and the conſent of the parties concerned.*

A *Poſtea* may be Amended by the Record in ſuch things whereby the Amendment may not bring the Jury within the compaſs of an Attaint, *Trin. 24. Car. B.r. For ſuch Amendment would be miſchievous, and the Law takes care to prevent miſchiefs.*

A Record may be Amended in a ſmall matter after Iſſue joyned, ſo that thereby the Plea be not altered, *Trin. 24. Car. B. r. nor the Record much defaced thereby; for Records ought to be fair, and plain to be read.*

A Record may not be altred by the conſent of the Atturneys on both ſides, without a Rule of the Court, and if it be, if the party grieved thereby will inform the Court of it, the Court will order to make the Record as it was before the Amendment, and will puniſh the Atturneys, 3. *Julii* 1650. *B. S. For the Judges have the prime Cuſtody of the Records of their Court, and they are to be ordered by their directions, as being things of a high nature, in reſpect both of the Common-wealth, and alſo of private intereſt in the parties concerned.*

If the Plaintiff Amend his Declaration, though it be by the Rule of the Court, yet the Defendant may plead *de novo*; *elſe it might be miſchievous to him, for the Amendment may make a good Plea bad.*

The Imparlance Roll cannot be amended by the Plea Roll, but the Plea Roll may be Amended by the Imparlance Roll, *Mich. 22. Car B.r. For the Imparlance Roll is firſt made, and is the Warrant of the Plea Roll.*

The

The Court Amends *falſe Latin and form*, in Bills preſented unto them by the grand Enqueſts by their conſents, but they may not alter matters of ſubſtance in them, *Mich.* 22. *Car. B.r. It is ſufficient for the grand Enqueſt to find the matters of ſubſtance well, for though they be uſually men of good rank and quality, yet it is not intended that they are alwaies good Clerks, or learned in the Law.*

The Plaintiff may Amend his Declaration after the Defendant hath pleaded to it, paying coſts if it be not entred; but if he do Amend it, the Defendant may alſo alter his Plea if he will, *Mich.* 22. *Car. B.r.*

Any Iſſue entred upon Record, may upon leave by the Court be amended in a ſmall matter, but not in a material thing, or in that which will deface the Record, *Hill.* 22. *Car. B. r. For the former would be to make another Record of it, and the latter would be to deface the Record, neither of which the Law allows.*

The Statute *de Jeofailes* doth not extend to Letters which are not of Record, *P.* 13. *Car.*

A thing that is Amendable by Statute, may be Amended in an upper Court, before it be Amended in the inferiour Court, if the matter be apparent and needs no examination, *Hill.* 22. *Car. B.r.*

A Plea cannot be Amended after the Plea is Demurred unto, nor after Iſſue joyned, *Mich.* 25 *Car. B.r.* for that were to go backwards, and to hinder the Plaintiffs proceedings, which the Law will not ſuffer, yet if the Demurrer be but in paper, though it be two or three Terms after the Plea was Demurred unto, the Demurrer may be Amended, if the party Demurring will pay coſts, though the other party have

joyned in Demurrer, 21. *Nov.* 1650. *B. S. For by paying of coſts the Plaintiff receives ſatisfaction for his delay, and diſpenſeth with the proceedings in Court.*

A Return of a *Habeas Corpus* may be Amended in matter of form only, the ſame Term the Return was made, but not afterwards, *Trin.* 1651. *B. S. It may not be amended in matter of ſubſtance, for this would be to make another return.*

It was not the Ancient courſe of practice to bring the Original Record out of the Common Pleas into this Court to amend the Tranſcript thereof by, until this Court had agreed it ſhould be Amended. This was obſerved to avoid needleſs charge which might otherwiſe fall out to the Clyent, *Paſc.* 1652. *B. Sup. by bringing the Record hither to no purpoſe.*

If the Common Pleas do Amend a Record there, which is not Amendable by Law, this Court is not bound to receive the Record ſo Amended, but will refuſe it, *Trin.* 1652. *B. Super. For this is the ſupreme Court, and will take notice of the Proceedings of other Courts, no further than they agree with the Law.*

After the Plea pleaded, and the Jury returned, the Defendant may not alter his Plea without moving of the Court. But before the Jury is returned if the Declaration, and the Plea be only in Paper, the party may Amend his Declaration, paying coſts, or giving an Imparlance, by *Herne Secondarie. Mich.* 1655. *B. Sup. For the Jury is returned to try that was joyned when they were returned, which they cannot do if it be altered.*

Q. Whether a Writ of Error may be Amended which is brought to reverſe a Common Recovery?

It

It was ſo by *Glyn Chief Juſtice, Hill.* 1655. that it is Amendable, becauſe a Writ of Error is in its nature but a *Certiorari* to remove a Record, and doth not give day in Court to the party to appear, *Paſc.* 1659. A Record was ordered to be Amended, after a Demurrer to that Record was diſcontinued.

Attatchment.

If a Rule of Court be made betwixt the Plaintiff and Defendant by their conſent; although the Court would not have made this Rule without ſuch Conſent, yet if either party will not obey this Rule, the Court will grant an Attatchment againſt him that diſobeyes it, if the other party deſire it: for this diſobedience to the Rule, is a trifling with the Court, and a ſlighting and contempt of their Authority, to which by their conſent they had formerly ſubmitted. In a Caſe betwixt *Middleton* Plantiff, and Sir *John Lenthal* Defendant, upon a Rule made by conſent, that Sir *John Lenthal* ſhould ſeal a Releaſe of Errors upon a Judgment, *Jan.* 27. *Hill.* 1655. *B. S.*

An Attatchment may be granted againſt one that ſtands Indicted of common Barratry, and will not plead to the Indictment, *Trin.* 23. *Car. B. r. for his contempt to the Court.*

This Court will not grant an Attatchment againſt one for diſobeying an Order made by Juſtices of Aſſize, *Mich.* 23. *Car. B. r. For that is no contempt to this Court, but to the Judge that made the Order.*

An Attatchment may be granted againſt the party that

that doth refuſe to joyn in a ſpecial Verdict agreed upon, and for refuſing to joyn in the paiment of the coſts expended upon the tryal, *Mich.* 23. *Car. B. r.* or for refuſing to bring it into Court, *Hill.* 1649. 26. *Jan. Saturday, Paſc.* 23. *Car. B. r. For every of theſe is contempt to the Court.*

An Attatchment is not to be granted againſt an Atturney for refuſing to obey an order made by a Judge of this Court in his Chamber, for this is no contempt to the Court, becauſe ſuch an Order is not to be accounted for a Rule of Court, *Mich.* 23. *Car. B. r. Except it be entred, for then it is a rule of Court, to which the Court expects obedience to be given.*

An Attatchment may be granted againſt Juſtices of the Peace, for proceeding upon an Indictment after a *Certiorari* out of this Court is delivered unto them, to remove the Indictment hither, *Hill.* 23. *Car. B. r. This hath been often done, and juſtly; for the Authority of this Court is not to be ſlighted by inferiour Authorities.*

An Attatchment was granted againſt one of the parties, to a Suite in this Court, for perſwading the Jurors returned to try the Iſſue in queſtion, not to appear at the day upon pretence that he had obtained an Injunction out of *Chancery* to ſtay the proceedings in the Suite, 25. *Oct.* 1650. *B. S. For thereby he laboured to obſtruct the proceedings of the Court by ſubtilty and falſhood which are odious in Law.*

If an Atturney undertake to appear for one, and afterwards refuſeth to do it, the Court will grant an Attatchment againſt him for his foul practice, *Paſc.* 23. *Car. B. r. in trifling with the Court, and abuſing the Clyent.*

The

The Court will not grant an Attatchment againſt one for diſobeying a Rule of the Court, except it be proved that perſonal notice was given to him of the Rule, *Trin.* 24. *Car. B.* r. viz. *where perſonal notice is requiſite.*

If one Arreſt another upon a Latitat, and then convey him into a Corporation, and Arreſts him again there, and proceeds not againſt him upon the Latitat, but in the Corporation, an Attatchment lies againſt him for abuſing the proceſs of this Court and making it a ſtale to another intent, 27. *Nov.* 1650. *B. Sup.*

This Court will make no Rule for an Officer thereof to be paid his Fees, before he have diſpatched his Clyents buſineſs, but if the Clyent will not pay him his Fees after he hath done his buſineſs, the Court will grant an Attatchment againſt him, by *Rolle Chief Juſtice. For although the Officer may have an Action to recover his Fees, yet this is not ſatisfaction for diſobeying the Orders of the Court, which is, for every Clyent to pay the known Fees, which are not due till the Clyents buſines is diſpatched.*

An Attatchment lies againſt the parties that will not pay ſuch coſts as are taxed by the Maſter of the Office of this Court, 21. *Car. B.* r. *For is it the taxing of the Court, though done by the Officer, and the refuſal to pay them, is a Contempt to the Court, and not the Officer.*

An Attatchment was granted againſt one for proceeding in an inferior Court, notwithſtanding that a *Habeas Corpus* Iſſued out of this Court, and thereupon a *Superſedeas* alſo granted to ſtay the proceedings there, and an Amercement ſet upon the party that was to return the *Habeas Corpus* for not making

a re-

a return of it, 21. *Car. B. r. For where the Authority of this Court doth interpoſe, there all inferiour Authorities are to ceaſe to act, and to be aſſiſtant to this Court in what they are required in the proſecution of the Cauſe here.*

In ſome caſes the Court doth not uſe to grant an Attatchment againſt perſons for miſdemeanors done againſt the Court, but will ſend a Tipſtaff of the Court to bring in the offender, *viz.* if the party do live in or near the Town. 21. *Car. B. r. For this is the readier way to bring in the party.*

An Attatchment was granted againſt a Sheriff, for refuſing to bring moneys into the Court which he had leavied upon an Execution, and was ordered by the Court to bring it in. *Mich.* 22. *Car. B. r. For the Sheriff is an Officer of this Court.*

Generally an Attatchment doth lie for any contempt done againſt the Court, *Hill.* 22. *Car. B. r. For the Court will uphold its Authority.*

An Attatchment was granted againſt one for taking out of an Execution without any Judgment to warrant it, *Hill.* 22. *Car. B. r. This was foul practice, and an uſurpation upon the Authority of the Court.*

An Attatchment doth lie by the Rules of this Court, upon motion, for not making a return of a *Habeas Corpus* upon a *Pluries Habeas Corpus* iſſued forth, *Hill.* 22. *Car. B. r. For this appears to be a high contempt in refuſing ſo often to obey the Proceſs of this Court.*

An Attatchment was granted againſt one for Arreſting one three ſeveral times upon Latitats taken out of this Court, for one and the ſame cauſe, and not proceeding againſt the party Arreſted upon any of them,

them, *Hill.* 22. *Car. B. r. For this was to uſe the Authority of this Court meerly for Vexation.*

An Attatchment was granted againſt two Bailiffs for Arreſting the Tenants of one *Glover*, upon a Latitat out of this Court upon the Lords day, when they might have done it as eaſily upon any other day of the week, 23. *Car. B. r. The Common Law is tender of the keeping of the Lords day.*

An Attatchment was granted againſt a Bailiff for executing of a Proceſs of this Court againſt the Rule of the Court, *Paſc.* 23. *Car. B. r.* having notice of the Rule. *For this appeared a wilful contempt.*

If one be endicted for Perjury, and the Witneſſes to prove the Perjury be ſerved with Proceſs to appear at the tryal and will not appear, whereby the tryal goes for the Defendant, the Court will grant a new tryal, and an Attatchment againſt the Witneſſes, in the Caſe of *Howel Gwin, Hill.* 1655. *B. S.*

An Attatchment cannot be granted againſt the Mareſchal of the Kings Bench; for this would be to let all the Priſoners eſcape, but a fine may be ſet upon him by the Court for miſdemeanours in his Office, *Hill.* 1655. in a cauſe againſt *Culpeper*, a priſoner with Sir. *J. Lenthall.*

Amercement.

The Clerk of the Peace is Amerceable by the Court of the Kings Bench, for groſs faults in Indictments drawn up by him and removed thither, and it hath often been ſo done. 21. *Car. B. r. For ſuch faults*

ſhall

ſhall be intended to be faults committed out of negligence and not out of ignorance.

If upon a Latitat taken out of this Court, the Sheriff doth return a *Cepi Corpus*, and the party arreſted upon this Proceſs, doth not appear at the day of the Return, the Sheriff may be Amerced by the Court, yet if the Sheriff be Amerced, if the party Arreſted do appear within a week after the day he ought to have appeared, the Amercement may by the courſe of the Court be taken off of the Sheriff, *Hil. 22. Car. B. r. For a weeks time is but a ſmall matter, and the party cannot be prejudiced by this ſmall delay*, & de minimis non curat Lex.

The Sheriff is to be Amerced for the faults of his ſpecial Bailiffs, for the Sheriff is the Officer to the Court, and not they, *Hill. 22. Car. B. r. But Q. whether he ſhall be Amerced for the faults of the common Bailiffs, it ſeems he ſhall, for they are his ſervants, and he takes ſecurity of them to keep him harmleſs.*

If the Sheriff be Amereed by the Court for the not doing a thing belonging to his Office, and yet he continues to neglect to do it contrary to the Rule of this Court, the Court may increaſe the Amercements upon him, until he perform his duty therein, *Trin. 23. Car. B. r. For the greater the offence is, the greater the puniſhment ought to be.*

Amercements ſet upon the Sheriff, upon the motion of the party, if they be not eſtreated into the Exchequer, may be with a *reſpecluatur*, that is be reſpited, if the party grieved who cauſed him to be Amerced will conſent thereunto, otherwiſe it cannot be. *Trin. 23. Car. B. r. For though the Amercements be due to the King, yet they were ſet upon the Sheriff for an injury done to the party.*

The

The Sheriff of *York* was Amerced in this Court, for not returning a Writ of *Habeas Corpus cum Cauſa*, though he was commanded not to do it, by the Biſhop then Preſident there, 14. *Ed.* 3. *Crompt. Juriſd. f.* 78.

A Sheriff out of his Office cannot be Amerced by the Court, for then he is not an Officer to the Court. But a *Diſtringas nuper Vice-comiti* may iſſue out againſt him, *Mich.* 23. *Car. B. r. to diſtrain him, and make him come in, for he is not now accounted preſent in Court, as when he was Sheriff.*

An Amercement which is grounded upon a Preſentment, which Preſentment is only voidable, by reaſon of ſome fault in it, is a good Amercement, but if it be grounded upon a Preſentment which is abſolutely void, the Amercement is alſo void, *Mich.* 24. *Car. B. r. For there is difference between a thing that is void, and a thing voidable, that which is but voidable, is good in Law, till it be legally made void, but a thing void, is void* ab initio.

Aſſignment.

The Aſſigning of a general Error upon a Writ of Error, brought to reverſe a judgment, is to ſay that the Declaration is inſufficient, that the judgment is given for the Plaintiff, whereas it ſhould have been given for the Defendant, &c. and it is not ſhewed for what reaſon it is ſo, 21. *Car. B. r. nor any particular Error aſſigned.*

If one bring an Action of Debt upon an Obligation that was given for performance of Covenants upon ſuppoſition of breach of the Covenants, he muſt aſſign but one breach of Covenant in that Action. Cr. Car. 176

Trin.

Trin. 22. *Car. B. r.* otherwiſe the Defendant can not juſtifie or take Iſſue. *And the aſſignment of one breach, if proved, is enough to maintain the Action.*

A Statute Merchant or Staple cannot be aſſigned over to another. *Mich.* 22. *Car. B. r.* 2.

If Leſſee for years Aſſign all his Term to come in his Leaſe over unto another, he cannot reſerve a rent for if he do, ſuch reſervation is not good, becauſe the Leſſee hath no Intereſt in the thing, by reaſon of which the Rent reſerved ſhould be paid: *Paſc.* 24. *Car. B. r.* 21. *Ap.* 1648. In the Caſe of one *Leach*, and *Day upon a tryal at the Bar.*

Averment.

Where a Statute is recited, there one may not Aver that there is no ſuch Record, for generally an Averment as this is, doth not lie againſt a Record. For a Record is a thing of a ſolemn and high nature, but an Averment is but the Allegation of the party, 21. *Car. B. r. and not ſo much credit in Law to be given unto it.*

One may not Aver a thing contrary to the Condition of an Obligation, no more than he may againſt a Record, for the Condition is part of the Deed which ſhall be ſuppoſed to be made upon good deliberation, and before Witneſſes, and not be contradicted by a a bare Averment. 7. *No.* 1650. *B. S.*

It was ſaid by the Court, that if one aſſume upon himſelf to do a future act, and an Iſſue is joyned upon this promiſe, whether he hath done this thing or no, the party needeth not to Aver that he hath done it, for the doing or not doing of it is Traverſable, and

the

the Plaintiff might have taken advantage upon the Defendants Plea if it was not true. *And therefore ſuch Averment is needleſs,*

Avowry.

If one make an Avowry for two cauſes, and can maintain his Avowry, but for one of them, yet it is a good Avowry, 21. *Car. B.r. For thereby it appears he had good cauſe to diſtrain.*

One Avowry may be made upon two ſeveral titles of land, though the Avowry is but for one Rent. 6. 1650. *For one Rent may depend upon ſeveral titles.*

Adjournment.

The Court is Adjourned by the Cryer of the Court after he hath made *Oyes* three times, and the ſubſtance of the Adjournment is to give licence to all parties that have any thing to do in the Court to forbear their attendance, and to take their eaſe till ſuch a time preciſely named, and then to attend in Court again. *The meaning of the word to Adjourn is to put of any thing to another day, and in the ſenſe here it is to put off the buſineſs of the Court till the day that is preciſely ſet, that none ſhould be bound to needleſs Attendance in the mean time.*

Every laſt day of the Term and every Eve of a day which is not *dies juridicus*, or a Law day, whereof there is two ſuch days in *Mich.* Term, *viz.* all Saints & all Souls day, and one a piece in *Hillary* Term, *Eaſter*

Term and *Trinity* Term, *viz.* the day of the purification of our Lady in *Hillary* Term, Aſcenſion day in *Eaſter* Term, and Saint *John* the Baptiſts day in *Trinity* Term, the Court is Adjourned, and it uſed to be done in *French* two ſeveral times, ſitting the Court towards the latter end of the day, a good ſpace of time being between the firſt and ſecond pronouncing of the Adjournment.

A Jury which doth not appear full, cannot be Adjourned, for ſuch a Jury is not accompted a Jury, *Hil. 22. Car. B. r. and ſo are not bound to attend the Court, for it would be to no purpoſe.*

The firſt Adjournment of the Court is about eleven of the Clock, and the laſt immediately before the riſing of the Court. *That all parties that have buſineſs in the Court, may the better take notice of it, who may haply be there at the laſt Adjournment, though not preſent at the firſt,* & è contra.

Adminiſtration.

The Mother ought to have the Adminiſtration of the Goods and Chattels of her Child before a ſon or a brother or a ſiſter. 22. *Car. B. r. Trin. For there is a nearer bond of nature between the Child and the Parents, than betwixt the child and any other collateral tye of blood or kindred: and the child can never ſufficiently ſatisfie the Obligation he hath to his Parents for his being and education eſpecially to his Mother.*

2 Rep: 40. a. Godb. 233.

But if the daughter marries, her Husband ſhall take Adminiſtration of her goods and not her Mother, *Franklin verſus Fruey, Hil.* 21. *Car.* 2. *Reg. in B. r.*

Where

Where the payment of money would not be for the advantage of the Teſtator, there the not paying of it cannot be pleaded to be to the retarding of the Adminiſtration of his Goods and Chattels, *Mich.* 22. *Car. B. r. For the eſtate of the Teſtator is not concerned by the paiment or not paiment.*

All Actions which an Adminiſtrator can have, is given unto him by ſeveral Statutes, *Mich.* 22. *Car. B. r. For the Common Law took no notice of an Adminiſtrator; but it did of an Executor* de ſon tort Demeſne.

Where an Adminiſtration is granted by ſuch a juriſdiction as the Law takes notice of, it is not neceſſary to ſhew that the Letters of Adminiſtration were granted by the Ordinary of ſuch a place, but where the Law takes no notice of the juriſdiction of that Court where the Adminiſtration was granted, the Letters of Adminiſtration muſt be ſo pleaded, viz. *per loci illius Ordinarium, Mich.* 22. *Car. B.r. For where the Law takes notice of a particular juriſdiction, it doth there take notice of the Acts done by vertue thereof; but where it doth not take notice of a juriſdiction, there it takes no further notice of the acts done by vertue thereof, than is made appear by the party that claims any priviledge in Law by them.*

Letters of Adminiſtration may be revoked by a Revocation without a ſeal, *Mich.* 22. *Car. B. r. For they may be granted by the Act of the Court as they call it without a ſeal. This I have heard Doctors of the Law affirm.*

The Ordinary ought not to repeal Letters of Adminiſtration which he hath duly granted, but if they be unduly granted, *viz.* to ſuch a perſon, who by Law ought not to have them, he may revoke them.

Paſc. 23. *Car. B. r. For if he might do it in the former caſe, this would be to make his power arbitrary which the Law abhorrs, but the latter is but to reform an error which all Laws do allow.* — Hil. 10: Bellworths Caſe

One of the half blood is in as equal a Degree of kindred to the Inteſtate to have Letters of Adminiſtration granted unto him as one of the whole blood is, *Mich.* 23. *Car. B. r. Though not as to inherit his lands.*

An *Indebitatus aſſumpſit* doth not lie generally againſt an Adminiſtrator, *Hill.* 23. *Car. B. r. But if it be ſhewn in the Declaration for what the Teſtator was indebted, it well lies.*

Letters of Adminiſtration granted *per Carolum Regem debito modo* adjudged to be well granted in that form. *Hill.* 24. *Car. B. r. This was when the Eccleſiaſtical Juriſdiction was taken away.*

Where the parties that require Letters of Adminiſtration from the Ordinary, are of equal degree of kindred to the Inteſtate, there it is in the diſcretion of the Ordinary to grant them to which of them he pleaſeth. *Paſc. & Mich.* 24. *Car. B. r. For by ſo doing, he doth neither of the parties wrong*; ſed Q. *whether he may not grant them to both.*

1 Roll. 316

Where one bequeaths a Legacy to one of his kindred, and the reſidue of his goods to another, Adminiſtration ought to be granted to him to whom the reſidue of the goods are bequeathed, *Mich.* 24. *Car. B. r. For it appears by the bequeſt of the Legacy to the party, that he intended only to make him a Legatee, and not an Executor of his goods and Chattels.*

Arreſt.

If an Action of Debt be entred in any of the Counter

Counters in *London*, a Serjeant may Arreſt the party without the Sheriffs Warrant. *Trin.* 22 *Car. B.r. For the entry of the Action there is a Warrant in Law for the Arreſt, and the Serjeants are attendants at the Counters, and may take notice of ſuch Entries; and it is that which impowers the Sheriff to make his Warrant.*

By *Glyn chief Juſtice, Mich.* 1658. If one be Arreſted within a Liberty without a *non omittas*, yet the Arreſt is good; for no inferiour Court can try the priviledges of this Court.

A Clerk of the Court ought not to be Arreſted for any thing which is not criminal, becauſe he is ſuppoſed to be alwaies preſent in Court, and muſt anſwer the Plaintiff there; and therefore he that doth Arreſt him is puniſhable by the Court. *Trin.* 23. *Car. B.r. and therefore ſuch an Arreſt is accounted to be vexatious, which the Law warrants not.*

One ought not to be Arreſted upon every ſlight ſuſpicion of Felony, but there ought to be a good ground ſhewed for the ſuſpicion before he is to be Arreſted; for Fame, Life and Liberty are precious things in the eye of the Law. *Mich.* 1649 *B.S. And to be preſerved as much as may be with juſtice.*

One that is not priviledged from Arreſt, by reaſon of his attendance upon his buſineſs in ſome Court of Juſtice, or ſome other waies priviledged by ſome ſpecial Rule or Order of Court, may be Arreſted in *Weſtminſter-Hall*, the Courts ſitting there. *Mich.* 1649. *B. S. And it hath been often done, for it is not the place, but their buſineſs and employments that protects the parties.*

Q. If the practice is not altered ſince (*Cur. Chriſtian.*) came up.

Appearance.

In all Transitory Actions, the Plaintiff after the Essoyn day of the subsequent Term after the appearance shall not alter his own Venew though he would pay costs, or give Imparlance, Pasc. 21. Car. secundi Regis, per Magistrum Livesay, & alios Clericos.

If an Infant be sued, he cannot appear, or plead by Guardian without admittance, but if he do, it is only a misbemeanour in the Atturney, for which the Court may punish him if they please, but no Error, Pasc. 21. Caroli secundi Regis, per Magistrum Livesay, &alios Clericos.

If one do give an Atturney Warrant to appear for him, and shall afterwards repeal this Warrant on purpose to delay his Appearance, the Court will notwithstanding the repealing of his Warrant, compel his Atturney to appear for him in such a manner as by the Rules of the Court he ought to have appeared, if his Warrant had not been repealed, *Trin.* 22 *Car. B. r. For the Law favours not delay, but will have speedy justice to be done.*

In all Cases where Process may Issue forth to take the persons body, there every such person may appear in Court in his proper person. *Hill.* 22 *Car. B. r. For such process, is but to bring in the party to answer, and he may do it in person if he please.*

Though one do appear in Court upon the Return of a Writ Issued forth against him, yet he doth not admit the Writ to be good by such his Appearance; for he cannot have Oyer of the Writ, until the par-

ty

ty hath declared againſt him, *Hill.* 22. *Car. B. r.* For he is Arreſted upon a Warrant made by the Sheriff upon receit of the Writ, and doth not ſee the Writ. *And the Law will not preſume any perſon to admit a thing which he knows not what it is, and may be prejudicial to him to admit it.*

The Principal cannot give a Warrant of Atturney to an Atturney to appear for his Surety, *Paſc.* 23 *Car. B. r. By the Rules of this Court, but it was uſually done heretofore in the Common Pleas, but now by the late Rules the practice there I ſuppoſe is agreeable to the practice of this Court.*

If an Atturney do promiſe to appear for his Clyent, and yet afterwards refuſeth to appear according to his promiſe, the Court will compel him to appear for him, although he ſay he had no Warrant to appear. *Hill.* 22 *Car. B. r.* And if he will not appear upon the Rule of the Court, an Attatchment lies againſt him for his contempt to the Court, *Paſc.* 23 *Car. B. r. & Mich.* 24. *Car. B. r. And falſe practice, yet if in truth he had no Warrant, and do appear, his Clyent if he be prejudiced thereby, may have an Action upon the Caſe againſt him; therefore let Atturneys be circumſpect what they do.*

If there be divers Defendants put in one Declaration, an Atturney is not bound by the Rules of the Court to appear for more of them, than ſuch as from whom he hath Warrant to appear, *Paſc.* 24. *Car. B. r. For their caſes may be different, though the Declaration be joynt, and every one may chuſe his own Atturney.*

If the Defendants Atturney do receive a Declaration againſt his Clyent from the Plaintiffs Atturney, this is an Appearance for him. 11. *Nov.* 1650.

B. S. 24. Maii Paſc. 1650. B. S. For thereby he admits his Clyent to be in Court, and takes upon him the defence of his cauſe.

In the Court of Common Pleas, upon a *Capias* iſſued forth in an *ejectione firme*, the Defendant is by the Rules of that Court to appear and plead in one and the ſame Term, but it is not ſo in the Kings Bench, for there he hath liberty to imparle to the next Term. *Trin. 24. Car. B. r. It ſeems to be more reaſonable that he have liberty to imparle, that he adviſe well what to plead, than to be forced to plead in ſo ſhort a time.*

An Infant ought to appear by his Guardian, and not by his Atturney, for he cannot make an Atturney, but the Court may aſſign him a Guardian with his conſent. *Paſc. 24. Car. B. r. Trin. 1650. So that his appearance by an Atturney is no appearance in Law, becauſe it is by one that hath no lawfull authority to appear, and the Law approves only of things lawfully done.*

The like was held by *Glyn Chief Juſtice, Mich. 1656. B. S.*

If one appear in this Court, but doth not put in Bail, this is accounted to be no Appearance, for it is the putting in of Bail that Attatcheth the Cauſe in Court; yet in the Common Pleas, it is held a good Appearance before Bail be put in. *7. Maii. 1650. B. Sup. &. to what intent it is ſo held.*

If an Atturney promiſe to appear for his Clyent, the Court will compel him to put in Bail for him. *For the promiſe to appear implies the other.*

If one appear by a name which is not in truth his right name, and thereupon the Plaintiff declares againſt

gainſt him by that name, he ſhall be eſtopped afterwards to ſay that he is not right named. 20. *Oct.* 1650. *B. S. For he ſhall not be ſuffred to take advantage of his own wrong to prejudice another thereby.*

If the Atturney do appear for his Clyent but *de bene eſſe*, that is, if his Clyent ſhall like and approve of it, he may ſend back the Declaration delivered him upon his appearance, and is not bound to plead unto it. 14. *Nov.* 1650. *B. S. For this was not an abſolute appearance, but a conditional.*

Two Nichils returned upon a *Scire facias*, and an *alias ſcire facias* do mount to an appearance upon which the party may proceed, 19. *Ap.* 1650. *B. Sup. For it ſhall be accompted a ſufficient notice to to appear, and the Plaintiff muſt not be delayed beyond reaſon.*

Affidavit.

An Affidavit made before a Maſter of the *Chantery* is of no force, nor ought to be read in this Court; nor will the Court make any Rule upon ſuch an Affidavit. *Trin.* 22. *Car. B. r. & Paſc.* 24. *Car. B. r. it is made* Coram non Judice, *as to this Court.*

An Affidavit ought only to ſet forth the matter which the party intends to prove by his Affidavit, and not to declare the merits of the Cauſe. 22. *Car. B. r. For the Court is to Judge of the merits of the cauſe, and not the party to ſwear them.*

The Plaintiff or the Defendant may make an Affidavit in the cauſe depending, and it may be filed here, but

but it cannot be admitted in evidence at the tryal of the cauſe.

An Affidavit touching the tryal of the cauſe ought to be made before one of the Judges of that Court, in which the cauſe is depending. *Mich.* 22. *Car. B. r. For the Court may make extraordinary rules in extraordinary Caſes for the ſpeedier proceeding in them.*

An Affidavit made againſt a Verdict is not to be admitted, *Paſc.* 23. *Car. B. S. For the oaths of* 12. *men are of far more credit, than of one.*

When an Affidavit hath been read in Court, it ought to be filed, that the other party may ſee it and take a Copy of it, if he pleaſe, By *Rolle Chief Juſtice. Paſc.* 1655. *to make what uſe of it he can for his advantage.*

Addition.

One may have one Addition at one day, and in one place, and yet may have another different Addition at another day, and in another place. *Mich.* 22. *Car. B. r.* For ſome Addition, *viz.* of Eſquire, Gentleman, Yeoman, *&c.* are no part of the name, but Additions *ad libitum*, and as people pleaſe to call them. But the Title of Knight, or Baronet, is part of the parties name, and it is material, to be rightly uſed in pleading, but the titles of Gentleman, or Yeoman, are Additions *ad placitum* to be uſed or not uſed, *Mich.* 24. *Car. B. r. Or to be varied.*

But the Title of an Earle of *Ireland*, is not an Addition *ad placitum*, *Mich.* 1649. *B. S. Becauſe it is an Addition given by Patent, which the Law takes notice of.*

Award.

Award.

An Award that is made, that one of the parties, who ſubmitted themſelves to the Award, ſhall pay money in the houſe of a ſtranger, is not good, for this is to Award him, to do a thing which will make him a Treſpaſſer, and ſo liable to an Action, which is unreaſonable: But between *Taverner* and *Skingle in Cro. Car.* 1266. it was held otherwiſe there after a long debate; the ſtrangers houſe there, being a Common Inne. *Mich.* 22. *Car. B. r.* But if the Award be to pay the money in the houſe of one of the parties that ſubmitted to the Award, ſuch an Award is good, for it implies a licence from the party, for him to pay it there. 10. *Feb.* 1650. *& volenti non fit injuria.*

An Award to pay money at the houſe of a ſtranger, may be a good Award: for he may come to the houſe (in many caſes) and be no Treſpaſſer: but if he cannot come to the ſtrangers houſe, without being a Treſpaſſer to him, there ſuch Award is not good, as I conceive. *Mich.* 22. *Car. B. r.*

A conditional Award is not good, becauſe it is not final to determine the matters in difference, ſubmitted to the Arbitration, as Awards ought to be, *Mich.* 27. *Car. B. r. For if they be not final, they are to no purpoſe; for they beget trouble in ſtead of making peace.*

If all the matters ſubmitted to the Arbitrators, be not Awarded upon, the Award is not good, *Paſc.* 23. *Car. B. r. Becauſe ſuch an Award is not final to end all differences ſubmitted.*

An

An uncertain and doubtful award is not good, becauſe it makes not an end of all the matters ſubmitted unto by both parties, but leaves them at large, to ſue and trouble each other, as they were before the award made. *Trin. 23. Car. B. r. For one party may conſtrue the award one way, and the other another way.*

An Award may be void in ſome part, and yet good in another part, *viz.* if the award do make an end of all the differences ſubmitted unto the Arbitrators, by the parties, *Trin. 23. Car. B. r. Mich. 24. Car. B. r.*

If each party ſubmitting to the Award, hath power by the Award to compel the other party, either by Law or equity to perform the Award; the Award is good although the party be thereby put to his Action. *Mich. 24. Car. B. r. Elſe it is not good, for that is not binding in the Law to the performance whereof the Law cannot compel the party bound.*

An Award that a thing ſhall be done to a ſtranger, is a good Award, if it appear that the parties who ſubmitted to the Award, have benefit by the doing of it. *Paſc. 1650 B. S. 4. Junii. For every Award is intended in Law to be made for the equal benefit of the parties that ſubmitted unto it.*

If an Award be good in any part of it, to all the parties that did ſubmit to it, if the Award be broken in that part, an Action will lie for that breach, *Paſc. 1650. B. S. 4 Maii. For as to ſo much it ſhall be accounted a good Award, and is to be performed, and the reſt of the Award, though unperfect, ſhall not vitiate that part which is good.*

An Arbitrator cannot delegate, or transfer the power given him by the parties that ſubmitted to the Arbitration, for it is contrary to the ſubmiſſion

but

but an Arbitrator may refer a Miniſterial act, touching the Arbitration to another. *Trin.* 1650. *B. S.* 15. *Junii. For ſuch act ſhall be accounted to be done by the Arbitrator himſelf, and the other that did the thing ſhall be accounted but his ſervant.*

The Court will not ſuppoſe any thing to be Awarded in an Award, which is not ſubmitted unto, except the contrary be made to appear. 10. *Feb.* 1650. *B. S. For this were to ſuppoſe the Arbitrators to do injuſtice by exceeding their Authority which the Charity of the Law will preſume no man will do.*

Affirmance.

It is not proper to move to have a Judgment affirmed after a Writ of Error brought to reverſe it, before the Errors be aſſigned, but one may move for Execution upon the Judgment. 22. *Car. B. r. For before the Errors be aſſigned the Court will intend the judgment to be good notwithſtanding the bringing of the Writ of Error; for a Writ of Error is many times brought meerly to delay the Execution, and without any juſt cauſe, and therefore it is not improper to move for execution, notwithſtanding a Writ of Error be brought, if the Errors be not aſſigned in due time after the Writ brought.*

Agreement.

A forced Agreement of the party, is accounted to be no Agreement, and therefore the Court will not compel him that did thus agree to a thing, to perform his agreement. 22. *Car. B. r. For the Law abhorrs all force and violence.*

An

An Agreement which is made between the parties only by Paroll, may be diſcharged and made void at any time before it is broken by Parol without ſatisfaction; for *eodem modo quo oritur, eodem modo diſſolvetur*, but after it is broken, it cannot be diſcharged without ſatisfaction of it. 22. *Car. B. r. For by the breach there is a wrong done to the party, which the words cannot releaſe without ſatisfaction, but before the breach no injury was done to any party, nor any of them injured by ſuch a diſcharge.*

If an Agreement made by Parol to do any thing be afterwards reduced into writing, the Parol agreement is thereby diſcharged; and if an Action be to be brought for the non performance of this agreement, it muſt be brought upon the agreement reduced into writing, and not upon the Parol agreement. *Paſc. 23. Car. B. r. For both cannot ſtand together; becauſe it appears to be but one Agreement, and that ſhall be taken which is the latter, and reduced to the greater certainty by writing*; for, Vox emiſſa volat, ſed Litera ſcripta manebit.

The Plaintiff and Defendant, may (by agreement between them) give money to the Jury before they paſs upon the tryal to defray their charges where the tryal is put off, and thereby they are forced to ſtay longer in Town than they expected. *Mich. 1649. B. S. For by doing of this the Jury cannot be intended to be made more favourable to one party than the other.*

By *Rolle Chief Juſtice*: If the Plaintiffs Atturney, and the Defendants Atturney, do agree to things in order to the proceedings in their Clyents cauſe, though the Clyents do afterwards refuſe to conſent

to

to their agreement, yet the Court will compel the Atturneys to perform the agreement. *For as they are Atturneys, the Law doth allow them to make ſuch agreements, and if the Clyent ſhould avoid them afterward, it would be miſchievous in delay of Juſtice.*

Atturnment.

An Atturnment made unto *Ceſtuy que uſe*, is a good Atturnment in Law to the Feoffee of the Land, if the Tenant of the Land have notice of the uſe, when he did Atturn Tenant to *Ceſtuy que uſe. Mich.* 22. *Car. B. r. For then he is not ignorant in whom the Eſtate in Law is, and to whom he makes the Atturnment.*

An Atturnment made after Sun-ſet, is not a good Atturnment, for an Atturnment is a ſolemn act, and ought to be done ſo that notice may be taken of it, which ſhall not be preſumed to be in the night. *Mich.* 23. *Car. B. r. For that is time for reſt, and not for action.*

Aſſumpſit or Promiſe.

A promiſe that is made upon a ſufficient conſideration, is, as if it were made upon a precedent condition, *Mich.* 22. *Car. B. r. For the conſideration ſhall be intended to be the cauſe why the promiſe was made, becauſe of which is alwaies preſumed to be before the effect.*

An Aſſumpſit or promiſe to do a thing upon conſideration, that he to whom he made the promiſe, ſhall ſurrender an Indenture to him, is a good conſideration to ground an Action upon for breach of this

this promiſe, although he to whom the Indenture is ſurrendred do take no eſtate by this ſurrender, *Mich. 23. Car. B.r. For though he take no eſtate by the Indenture, yet he may perchance have ſome tollerable benefit, by reaſon of the ſurrender, and he that ſurrendred it may be prejudiced by the ſurrender; and therefore it is reaſon that the party ſhould be repaired by the performance of the promiſe made before the ſurrender.*

If one upon a good conſideration do aſſume or promiſe to do a thing, he that promiſed to do it, ſhall have a reaſonable time allowed to him for the doing of it, and ſhall not have liberty to do it at any time during his life. *Hill. 22. Car. B. r. For the party promiſing, receiving a preſent benefit by the conſideration, it is not reaſon the other party ſhould expect ſo long for the benefit he is to receive by performing the promiſe, as the whole life of the party, though the Law will ſtreighten no man in time for doing of any thing.*

Where an Aſſumpſit or promiſe is the very ground of the Action brought, there it muſt be pleaded preciſely; but where it is but the inducement to the bringing of the Action, there it is not neceſſary, to ſet forth the promiſe preciſely in the pleading. *Paſc. 23. Car. B.r. For the ground of every Action which is brought ought to be ſet forth in the Plaintiffs pleading, that the Court may judge whether there be cauſe of Action or not.*

Every contract made betwixt parties, doth in Law imply a promiſe that they will perform the contract. *Hill. 1649. B. S. 4. Feb. For elſe the Contract would be idle and to no purpoſe, for want of a remedy in Law to compel the parties to perform it.*

He

He for whoſe benefit a promiſe is made, may have an Action for the breach of this promiſe, although the promiſe was not made to him. *Paſc.* 23. *Car. B. r. For where the Law gives any benefit to any, there it alſo affords a remedy to the party to obtain it.*

The conſideration to ſtay his proceedings in a Suit in Law, is a good conſideration to ground an Aſſumpſit. *Trin.* 23. *Car. B. r. viz.* for ever, or for a certain time. *But if he promiſe to ſtay* Paululum tempus, *it is held by ſome not good. For the party to whom the promiſe is made, ſhall be intended to receive benefit by the forbearance, and the other party may be prejudiced by forbearing to ſue for ever, or for a certain time; but to forbear* Paululum tempus, *is uncertain, and inconſiderable; for it may be but for a minute, which can neither be profitable to the one, or a dammage to the other party. Of this Q. for it hath been adjudged both good and bad.*

If one part of the conſideration, upon which a promiſe is made to do a thing againſt the Law, and ſo void; yet if another part of the conſideration be good and lawful, the conſideration is good to ground an Aſſumpſit upon, for the conſideration may be divided, and if any part of it be good, it is ſufficient to make the promiſe good. *Mich.* 23. *Car. B. r. And the promiſe is the ground of the Action.*

An Aſſumpſit grounded upon a conſideration which was paſt before the promiſe made, is a good Aſſumpſit, if it be alledged to be made at the inſtance or requeſt of the Defendant. *Paſc.* 24. *Car. B. r. For being performed at his inſtance and requeſt, it ſhall be intended to be for his benefit, and for which he is to make a recompence to the other party.*

After a promiſe is broken, the party that made this promiſe cannot be diſcharged of this promiſe by Parol, but where the promiſe is executory he may. *Paſc.* 24. *Car. B.* r. *For by the breach, a right of Action accrues to the party for the wrong done unto him by the breach, which cannot be releaſed by Parol; for before the breach no injury is done, nor any thing due to the party by the promiſe.*

Where one becomes legally indebted to another, the Law creates a promiſe, that he will pay this debt; and if he do not pay it, there is a ſufficient ground for the party to whom he is indebted, to bring his Action of *Indebitatus Aſſumpſit*, againſt him to recover this Debt. *Trin.* 24. *Car. B.* r. *For where the Law creates a duty, it doth there give a remedy to recover it.*

If the day of an Aſſumpſit made be pleaded in figures and not in words at length, it is erroneous. *Paſc.* 24. *Car. B.* r. *For the time is material, and figures are not words to expreſs any thing, and pleadings muſt be in words.*

In an Action brought upon a promiſe, it is uſual to ground the Action upon one promiſe, in the ſubſtance of it, but to lay the promiſe divers wayes and by different words in the Declaration, to the intent that upon the tryal, the Plaintiff may reſt, or relie upon that way of laying, that his witneſſes are beſt able to prove. *Mich.* 24. *Car. B.* r. *For if the promiſe be proved in the ſubſtance of it, it is ſufficient.*

If one be indebted to another, and do promiſe to pay this debt at a day to come, the party to whom he made this promiſe, cannot bring his Action for the Debt until the day be paſſed upon which he promiſ-

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ed to pay it, By *Roll Chief Juſtice*, and by *German* Juſtice; for he ſaid that the promiſe is a ſuſpenſion of the Debt. *Pro tempore*, 29. *Jan.* 1650. *B. S. Quære tamen.*

If one promiſe unto a woman, that in conſideration that ſhe will marry with him, he will intermarry with her; this is a mutual promiſe, and an Action lies by either party againſt the other for breach of it. 18. *Ap.* 1650. *B. S. For it ſhall be intended to be made for the benefit of both the parties.*

Appeal.

In a Writ of Appeal, all the pleadings are entred in Latin, but Counſel ought to count in French, as in real Actions in the Common Pleas. *Mich.* 22. *Car. B. r.*

If in an Appeal, the Defendant plead in abatement of the Writ, and the Writ be adjudged good, it is peremptory, and he ſhall not be permitted to anſwer over, but ſhall be condemned upon the Writ. *Mich.* 22. *Car. B.r. For the more ſpeedy proceeding againſt ſuch offenders in criminal cauſes.*

In an appeal, the Appellant ought to appear in Court in perſon, yet upon a motion to the Court, the Court may admit him to proſecute his Suite by his Atturney. *Mich.* 22. *Car. B.r. For there may be reaſons for his abſence.*

The defect in any Proceſs in an Appeal, doth diſcontinue all the Appeal, and makes an end of the Action, as well as a defect in the Original Writ. *Hill.* 22. *Car. B.r. This is in favour of life which the Law is tender of.*

Age.

If the queſtion be, whether the party be of full Age, or within Age, it ſhall be tryed by the Court, by inſpection of the party, and not by a Jury. *Hill. 22. Car. B. r. And by other concurrent proof made to the Court, as well as by viewing of the party; for the Court in ſome caſes may be deceived, if they ſhould rely only upon the view of the party.*

Advantage.

It is not good practice to take an advantage againſt the Defendant, to obtain a tryal the ſooner againſt him, for it cauſeth clamour from the party, and makes him (oftentimes) preſs the Court for a new tryal. *Hill. 22. Car. B. r. And the Law would have all proceedings to be fair, and without cauſe of clamour.*

He that will in pleading, take advantage of a particular Statute, muſt ſhew particularly, that he is compriſed within the Statute. *Paſc. 23. Car. B. r. For the Court is not bound to take notice of his particular concernment, except he ſhew how he is concerned: but if it be a general Law, it is otherwaies.*

Aſſize.

The Kings Bench may hold Plea of Aſſiſes of land in the ſame County where the Common Pleas ſitteth and at the ſame time without Patent; the reaſon ſeemeth to be, becauſe that an Aſſiſe *non eſt placitum ſed querela*, and ſo out of the Statute of *Mag. Char.* 11.

It

It is necessary to have 15. daies between the teste and the return of a Writ of Assise.

An Assise is to be Arraigned in *French*, and first the Defendants Councel doth pray the Court, that the Tenant may be called, which the Court grants, and thereupon he is called by the Cryer of the Court, and if upon his calling he do appear, then the Tenants Councel do demand Oyer of the Writ of Assise, and the Return of it which is granted, and thereupon he prayes leave of the Court that he may Imparle which is granted to a short day after, and the Jury is adjourned by the Court to appear at that day. *Hill. 22. Car. B. r. This is* festinum remedium, *and no such quick dispatch in other Civil Actions.*

Note that the Jurors that are to trie the Assise, are called Recognitors of the Assize. *Because they take notice of the matter of seisin or disseisin by a matter enquired, after the evidence given to them, or because they acknowledge the matter of fact by their Verdict, as* Cowel tit. *Recognitors affirms.*

At the day granted unto the Tenant to Imparle unto, the Tenant is called, and upon his appearance he pleads to the Assize in Latin, and upon this an Issue is joyned between the parties, and after the Jury or Recognitors of the Assize are examined upon oath upon a *voire dire*, whether they had the view of the land in question, and if they say they have had, then are they sworn to try the Issue, and the Councel do proceed to give them their evidence. *Pasc. 23 Car. B. r. Observe that in these Actions, the Jury view the land in question before evidence given, but in an Ejectment the Jury have the view after evidence, and not then but by consent of the parties.*

Arraignment.

If in an Appeal brought, the Writ be abated, the Defendant cannot be Arraigned upon the count which is grounded upon this Writ. *Paſc.* 23. *Car. B.r. For the Writ is the foundation of the Count, and if it fail, the Count muſt needs fail, for there is no foundation for the Arraignment.*

A man was Arraigned for ſtealing 12 oxen, the priſoner confeſſed he ſtole 20. and was again Arraigned for the other 8. and had judgment to be hanged. *Apud Nottingham circa* 20. *Eliz.*

If the Defendant in an Appeal be acquitted, yet he may be Arraigned at the Kings Suite. *Dyer*, 121. *Mich.* 14. *H.* 7. *Rot.* 7. and *Trin.* 14. *H.* 7. *Rot.* 174.

One *Awbry* that had been (formerly) Indicted for felony upon the Statute for having two Wives, and was Outlawed upon this Indictment, was brought to the Bar and Arraigned to this effect. Firſt the ſecondary on the criminal ſide, ſpake thus, Awbry *hold up thy hand*, which the priſoner did; then he proceeded thus, Awbry *thou haſt been heretofore Indicted of felony, and thereupon Out-lawed in due courſe of Law, for having of two Wives, and haſt been Arraigned thereupon, what canſt thou ſay for thy ſelf, why thou ſhouldſt not have ſentence of death pronounced againſt thee.* Priſoner, *I take this exception to the Indictment, that it is not ſaid to be found* per ſacramentum duodecim proborum & legalium hominum; *and I deſire I may have* Twiſden *and* Hales *aſſigned for my Councel.* Court. *You ſhall have them.* Thereupon the Councel prayed that the priſoner might bring a Writ of Error to

Reverſe

Reverſe the Out-lawry. Court. *Lett him have it.* Note that the Priſoner in ſuch caſe cannot be admitted to bring a Writ of Error, until he ſhew ſome probable matter of Error to warrant it.

In Civil Actions the Defendant may bring a Writ of Error, before he aſſigns any Error, becauſe the Common-wealth is not there ſo much concerned, and there he puts in good Bail, to anſwer dammages to the party for his delay; but here can be no ſuch thing done to the Common-wealth,

Attaint.

An Attaint doth lie againſt a Jury, that do give their Verdict, contrary to the evidence that is given unto them. *Paſc. 23. Car. B. r. By the Stat. of 23. H. 7.*

Audita Querela. v ſt. 143

Where the Bail is detained in priſon, in Execution after the judgment, which was given againſt the Principal, is reverſed by a Writ of Error; there the Bail may bring an *Audita Querela*, to be diſcharged. *Paſc. 23. Car. B. r. Becauſe he is unjuſtly vexed by impriſonment without lawful cauſe.*

If one be taken in Execution, and is afterwards ſet at liberty, and then is taken again and detained in priſon upon the ſame Execution, he may bring his *Audita Querela* to be enlarged. *Mich. 24 Car. B. r. For by the enlargment of the priſoner, the Execution is diſcharged, and an Execution once diſcharged, is for ever diſcharged, and cannot be received, for the diſcharge ſuppoſeth ſatisfaction.*

If a Judgment given in another Court be removed into the Kings Bench Court by a Writ of Error, and the party who had the Judgment (notwithſtanding the removal of it by the Writ of Error) do bring an Action of debt upon this Judgment in the Court where he obtained the Judgment, as he may do, if afterwards pending this Action of Debt, the Judgment be Reverſed by a Writ of Error, the Defendant againſt whom the Judgment was obtained, may bring his *Audita Querela*, to be relieved againſt the Action of Debt, brought upon the Judgment. 3. *Feb.* 1650. *B. S. For when the Judgment is reverſed upon which the Action of Debt was grounded, there is no cauſe left to ſupport the Action; and therefore all proſecution of the Action afterwards, is accounted in Law but an unjuſt vexation, for which an* Audita Querela *lies.*

One *Tritton* that was in Execution, brought his *Audita Querela*, and prayed he might be Bailed, and it was granted, and he was Bailed by four perſons. 7. *Feb.* 1650. *B. S. For this Bailing of him is not a diſcharge of the Execution; for by his Baile, he is in cuſtody of the Law, and if he make not out his* Audita Querela, *he or his Bail muſt render his body in Execution again, or elſe the Bail muſt pay the Debt for which he lay in Execution.*

Authority.

Doctor *Cowels* Book, called the Interpreter, is not a Book of Authority, to be urged for Law, for it was condemned to be erroneous and ſcandalous by Parliament, and by the Authority thereof, was publickly burned as erroneous and ſcandalous. By *Rolles Chief Juſtice.*

A Verbal authority given by divers Plaintiffs, in an Action of Treſpas, and Ejectment to deliver a Leaſe of Ejectment upon the Land, though the Leaſe be ſigned and ſealed by them off of the Land Let in the Leaſe, is a good authority to execute this Leaſe. So held in a Tryal at the Bar, between *Vanlore* and *Crook. Mich.* 1649. 7. *Nov. B. S. For nothing paſſeth from thoſe that deliver the Leaſe, by vertue of ſuch delivery, but from them that made the Leaſe, and their authority by word for another to deliver it is no more, than if they had themſelves delivered it; and the other is but an inſtrument to put in Execution the mind of the Leſſors, as their own hands had, had it been delivered by themſelves.*

Apurtenant and Apendant.

Yards, Orchards and Gardens, are Appurtenances to a Meſſuage, but Lands cannot be ſaid to be Appurtenant to a Meſſuage, though they be uſed with the Meſſuage, for the Meſſuage is a Meſſuage, though the Lands be taken away. *Hill.* 23. *Car. B. r. But yet is not ſo if the Yards, Orchards and Gardens, are taken away from it, for then it becomes but a Cottage or Tenement.*

One Meſſuage cannot be Appurtenant to another Meſſuage, for they are (both) entire things of themſelves. *Paſc.* 24. *Car. B. r. And things that are entire, are ſo themſelves, without relation to other things, as part of, or dependant upon them.*

Account.

An Action of Account, or an Action of Debt or an Account upon the Caſe, lies at the election of the Plaintiff, againſt one for receiving money of a third perſon for the uſe of the Plaintiff, although he had no authority given him to receive it. *Hill.* 23. *Car. B. r. For it is the intereſt that the Plaintiff hath in the money paid for his uſe that gives him the cauſe of Action, and it is a receipt of the money that makes the other party lyable to the Action, and it matters not by what Authority he received it.*

The Statute of limitations of Actions, doth not bar the Plaintiff from bringing an Action of account, although he do not bring the Action within the time limited by the Statute, for before that Statute, one that had once cauſe of Action, might bring it at any time afterward without reſtriction of time, and this Action is not mentioned in the Statute. *Trin.* 1650. 20. *Junii. B. S. And conſequently not barred by it, this Statute being in reſtriction of the Common Law.*

An Action of Account doth not lie for Rent (alone) due and arrear, for the Rent demandable is certain, but if the Rent be behind, and there are (alſo) other things mixed with it, for which the Action is brought, then an Action of Account may be brought for both of them together, becauſe it is incertain upon the whole matter what is due to the Plaintiff. *Trin.* 1651. *B. S. For an Action of Account doth imply that the Plaintiff doth not know what is juſtly due to him, but requires the Defendant to declare and ſatisfie what is due.*

If one receive money due to me upon an Obligation

ent, or for Rent due to me, I may either have an Action of Account against him as my receiver, or an Action of Debt, or an Account upon the Case, as owing me so much money as he hath received; though in all these cases he hoth receive the money without my consent, *Tri.* 1651. *B.S. For by his receipt of anothers money, he hath made himself lyable in Law, to give an Account if the monies be incertain, or to pay them to the party to whom in Law they are due.*

Auditor.

Many things are in charge with the Kings Auditors which are not in the Crown. *Pasc.* 24. *Car. B.r. For a thing cannot be vested in the Crown, nor taken out of the Crown, but by matter of Record, which the Auditors Books are not.*

Auditors assigned by the Court, upon an Action of Account brought to receive the Account, are proper Judges of the cause. *Trin.* 24. *Car. B.r.* viz. *whether the party accountable be in arrear or not.*

Argument.

Two that are of Councel on one side, ought not to Argue for their Clyent both of them upon one and the same day, except it be for concluding of all the Arguments which are intended to be made for that party. *Mich.* 1649. *B.S. By the Custom of the Court. But one of one side and another on the other side, may argue in one day.*

It is not the usual course of the Court, for one Councellour to argue the same Case twice. By *Rolle Chief Justice.* 12, *Nov.* 1650. *B.S. For it is intended, that*

that when he firſt Argued, he ſaid all he could for his Clyent, and the Court will not admit the ſame matter to be repeated, but will hear what another can ſay, if there be cauſe.

Aide and Aide Prayer.

A Tenant for life may pray in Aide of all ſuch perſons as are in remainder of eſtate in the Lands for which he is impleaded. 1649. 29. *Julii, B. S. For they are all concerned by reaſon of their ſeveral intereſts, to defend the particular Eſtate upon which their remainders depend.*

Baron and Fem.

AN Action of Debt doth lie againſt the Husband for goods that were delivered to his Wife, if it may be intended that thoſe goods did any way come to the uſe of the Husband. *Hill.* 21. *Car. B. r. If they come to the uſe of the Wife, they are in Law ſaid to come to the uſe of the Husband; for the Husband and Wife are but one perſon in Law.* Dubitatur hoc Q.

A Fem Covert cannot ſubmit to an Award, for the ſubmiſſion is a free Act of will, and the will of a Fem Covert is ſubject to the will of her Husband, and ſo is not free. *Mich.* 22. *Car. B. r. But another perſon may ſubmit to an Award for a matter which concerns the Fem, and ſuch a ſubmiſſion is a good ſubmiſſion in*

Law

Law. For it may be he may receive benefit by the ſubmiſſi-on, yet if he do not, it matters not.

A Feofment made to a Fem Covert is a good Feofment in Law to paſs the Lands, if the Husband do know of it, until the Husband do diſagree to it, for if he diſagree from it, the Feofment is not good; for till he diſagree to it, it doth not appear but that he conſented to it, and a Wife may give or take with the conſent of her Husband; for ſuch giving and taking are ſaid in Law to be the Acts of the Husband and not of the Wife: but if he once agree to it, he cannot afterwards diſagree from it, and if he once diſagreee, he cannot afterwards agree to it. *Q. Hill. 23. Car. B. r. For this were to do and undo.*

A Fem Covert may take a thing, though it be not by Deed. *Hill. 23. Car. B. r.* viz. *If her Husband conſent to it, for it ſhall be intended for his benefit.*

If a Fem ſole be indebted to *I. S.* and afterward the Fem doth marry, this Debt is become by the marriage, the Debt of the Husband and of the Wife, viz. the proper Debt of the Wife, and the Debt of the Husband in right of his Wife, and the Wife muſt be ſued for this Debt joyntly with her Husband; and if the Husband die, pending the Suite, yet is not the Debt gone, but ſhe may be ſued for it after the death of her Husband; but if the Husband be not ſued for this Debt during the life of his Wife, he can never be ſued for it after her death. *Paſc. 24. Car. & Trin. 24. Car. B. r.* Viz. *By a new Addition.*

If a Writ be ſued out againſt Husband and Wife, and

and the Wife only be arrested and detained in ſon ſhe ſhall file a common Bayle, and have a perſedeas to diſcharge her; but if her Husband ly be arrested, he muſt appear for himſelf and Wife. Per Magiſtrum Liveſay, & allos &c. Paſ. Car. ſecundi Regis.

Bar in Actions.

A Recovery in a perſonal Action, is a Bar in all ther perſonal Actions touching the ſame matter. 21. *Car. B. r. That is to ſay, it is a Plea in Bar to perſonal Action brought againſt the Defendant, to ſ that the Plaintiff did formerly bring an Action agai him for the ſame matter, and did recover againſt hi and therefore he prayes the Judgment of the Court, wh ther he ſhall be permitted to proceed in his ſecond A ction; for no man is to be doubly vexed for o cauſe.*

In an Action brought to recover a thing from another, if a recovery be thereupon had by the Plaintiff the Defendant may plead this recovery in Bar of ſecond Action brought againſt him for the ſame thing. 21. *Car. Br. for the reaſon aforeſaid.*

A Plea in Bar which doth not give a full anſwer, to all the matter which is contained in the Plaintiffs Declaration is not a good Plea. 21. *Car. B. r.* viz. *If it anſwer not all the material matter of it. For it appears by the matter of the Declaration unanſwered, that the Plaintiff hath cauſe of Action notwithſtanding that which the Defendant hath ſaid to the contrary.*

If the Plaintiff do reply to the Defendants Plea in Bar, this replication is a confeſſion in Law, that the Plea

Plea in Bar is a good Plea as to the matter of form, although the Plea be not good. *Trin.* 23. *Car. B. r. For the Plaintiff hath slipped his advantage of Demurring to the Defendants insufficient Plea by replying unto it.*

If an Action of Debt be brought against any one, and he imparles till the next Term, yet after his Imparlance, he may plead that the Plaintiff is Out-lawed in Bar of the Action. *Trin.* 22. *Car. B. r. For an Out-lawed person cannot take any advantage of the Law against another so long as he stands Out-lawed. But a Plea in Abatement of ancient Demesne &c. must be pleaded before Imparlance; because when the Defendant Imparles, then he admits the Court to have Jurisdiction of the Cause.*

Baile.

By *Glyn Chief Justice, Trin.* 1657. If Common Baile be put in to the Plaintiff in an Action depending here, that Baile so put in, is lyable to be common Baile to all other persons that shall put in Declarations against him, so that the Declarations be put in the same Term. This is the course of the Court.

In the Case of *Jones versus Price*, it was said by *Glyn Chief Justice, Trin.* 1657. That although one be Baile for the Defendant in an Action, yet he may be a witness for the Plaintiff in the same Action. Q. For the Baile seems to be concerned in the Tryall

One that is in Execution, is not Bailable by the Law. *Hill.* 21. *Car. B. r. For Bail is put in to secure the Plaintiff, that the Defendant shall perform the Judgment*

9 Co. Jac. 108. ff 3

ment of the Court, and now the Law hath determined the matter, and there remains only for the Defendant to perform the Judgment, and for the not performing it he lies in Execution.

Before a *Capias* is taken out againſt the Bail, the Principal may render his body to the Marſhal of the Court. And then the Defendants Atturney ought to get a Certificate from the priſon, that the Defendant is in cuſtody; and thereupon the Maſter of the Office will diſcharge the Bail peece, by writing Reddidit ſe upon it: otherwiſe the Bail are chargeable notwithſtanding the Priſoner is in cuſtodie, Streeters 17. per Cur. Trin. 18. Car. 2di.

One that had been Indicted thirteen years before for ſuſpicion of murder in poiſoning his ſervant, was brought in Court by a *Habeas Corpus*, and was bailed to anſwer the fact. 21 *Car. B. r. This was permitted by the Court to be done; becauſe the Priſoner had been ſo long in Priſon without any proſecution of the Endictment againſt him, in favour of liberty.*

Though one that is in Execution, do bring a Writ of Error to reverſe the Judgment given againſt him, yet the Court will not Bail him, except there appear unto them very apparent Error in the Record. 21. *Car. B. r. For elſe they will ſuppoſe that the Writ of Error is only brought to gain the parties liberty, and ſo to fruſtrate the effect of the Execution.*

Lee Jan. 25. 1. Obr. 680

That if the Defendant render himſelf to cuſtody in diſcharge of his bail, upon the day of the Return of the ſecond Scire facias againſt the Bail, Sedente Cur. or if an Action be brought upon the Recognizance,

nizance if he render himself upon the day of the return of the Process against the Bail, sedente Cur. the Bail are discharged. Per Magistrum Livesay & alios, Pasc. 21. Car. 2. Reg.

One *Arnold James* that was Bailed in 44. and 45. year of Q. *Eliz.* upon a Judgment given against him in the Lord Majors Court of *London*, was brought into Court by a *Habeas Corpus*. *Trin.* 22. *Car. B. r. The prisoner was suffered to bring his* Habeas Corpus *because he had gone under Bail so long, and no prosecution against him that he might discharge his Bail.*

The Court did take Bail for a prisoner, against whom an Apeal of murther was brought, because that he did not flee for the murder supposed, and had been formerly Indicted for this murder, and acquitted upon the Indictment. *Mich.* 22. *Car. B. r. Upon which presumptions they conceived he was not guilty, else would not have Bailed him.*

Bail pieces are small pieces of Parchment, in which is written the substance of the Bail, and are filed in the Office of the Court. *Mich.* 22. *Car. B. r.*

If the Plaintiff require special Bail, he ought to shew his cause of Action, before the Judge that takes the Bail; or else, to declare against the Defendant, that it may appear to the Court, that there is cause, why special Bail should be given, otherwaies common Bail is to be filed. But now by a late Statute, if the Plaintiff do not shew the cause of Action in his Writ by way of *Bille*, &c. the Defendant may file a common Bail. And if he will not declare against the Defendant till after 3. Terms, then by the course of the Court he must take common Bail what ever the cause of Action be. *Hill.* 22.

Car. B. r. Trin. 24. *Car.* 1650. 22. *Junii. For it ſhall be intended that the cauſe of Action is not ſo great as to require ſpecial Bail becauſe the Plaintiff makes no more haſte to proceed.*

Where one is ſued as an Executor, he is not compellable to put in ſpecial Bail; but in caſe of a *Devaſtavit* for waſting the goods of the Teſtator, or where the Action is brought for ſomething done by him ſince he became Executor, and that muſt be by motion in Court. *Hill.* 22. *Car. B. r. Note, for in the former caſe he is lyable no further than he hath aſſets, be the cauſe of Action never ſo great; but in the latter caſes he is, and therefore ſhall put in Bail, ſuch as the Action would require if he were not Executor.*

If an Action be brought againſt Husband and Wife, and the Husband is only Arreſted; yet the Husband muſt put in Bail for his Wife, if the name of the Wife be in the Writ, elſe he is not bound to put in Bail for her. *Hill.* 22. *Car. B. r. For it is the Writ that warrants the Bail.*

One may depoſite a ſum of mony in Court in lieu of Bail, if the Court pleaſe, and they may thereupon order the Plaintiff to waive other Bail. 22. *Car. B. r. & Trin.* 23. *Car. B. r. If the ſum depoſited be ſufficient to ſatisfie the Plaintiff in caſe the Tryal paſs for him; for then the Plaintiff can ſuffer no inconvenience by it; for the Court may order him to take the money depoſited, for his ſatisfaction after ſuch tryal had.*

If the Defendant do render his body in cuſtody in diſcharge of his Bail; the Plaintiff ought by the Rules of the Court to make his choice whether he will proceed afterwards againſt the Principal or the Bail. *Hill.* 22. *Car. B. r. For he ought*

not

not to proceed againſt both, and now it is in his power to make his election.

After the Roll is marked to have ſpecial Bail, common Bail ought not to be entred; but if the Roll be not marked for ſpecial Bail, common Bail may be entred. *Hill. Car. B. r. For nothing appears to the Court that ſpecial Bail was required, and then common Bail is to be filed of course.*

One that ſtands Indicted for Felony, or for Forgery, ought not to be Bailed, until he have pleaded to the Indictment. *Paſ. & Trin. 23. Car. B. r. For the parties ſhall be conceived to be guilty of the Crimes until they plead: and there is difference between Criminal offences, and civil Actions.*

If one be committed to priſon by the Houſe of Commons in Parliament, the Court will Bail the party, if in reſpect of his Fact he is Bailable in Law. *Paſc. 23. Car. B. r. 2.*

The Court will not Bail one that appears in Court upon the Return of his *Habeas Corpus*, before they have conſidered of the Return, to enform themſelves whether he is Bailable by the Law or not. *Paſc. 23. Car. B. r. For before that, it doth not appear judicially to the Court for what cauſe the party ſtood committed.*

One committed by a Juſtice of Peace upon the Statute for having of two Wives, and appearing in Court upon the Return of his *Habeas Corpus*, was Bailed upon the prayer of his Councel. *Trin. 23. Car. B. r.*

Where the not filing of common Bail, will make Error in the Record, there the Court will compel the Plaintiff to accept of it. *Trin. 23. Car. B. r.* Viz. *In ſuch caſes where common Bail was to be accepted.*

One that is within Age, is not to be admitted to be Bail for another. *Trin. 23. Car. B. r. For he is not a perſon (of himſelf) reſponſable at the Law; as one that is Bail muſt be for him for whom he becomes Bail.*

One committed for Felony and brought into this Court by his *Habeas Corpus*, may not be Bailed with leſs than four Suerties. *Hill, 23 Car. B r. For the Crime being Capital, requires extraordinary Bail, in reſpect of the Kingdoms concernment.*

The putting in of a Declaration, and the acceptance of it by the Defendants Atturney, with the privity of the Plaintiffs Atturney, is counted an acceptance of the Bail. *Hilt. 23. Car. B. r. & 1650. Paſc. 14. Mar. For by accepting the Declaration he takes upon him to plead.*

After Bail put in before a Judg, the Plaintiff hath 20 daies time to except againſt it, which if he doth not do, then the Defendants Atturney may take it away from the Judges Chamber, and file it *nolens volens* the Plaintiffs Atturney, and if the Defendants doth not file it in time, he incurrs the penalty of 5. s. *Mich. 17. Reg.* per Cur.

If a priviledged perſon in this Court, do bring an Action againſt another in this Court; he ought by the courſe of the Court to have ſpecial Bail put in to his Action. *Hill. 23. Car. B r. Whether there be cauſe for ſpecial Bail or not. This I ſuppoſe is* ex gratia.

Though one be Aſſigned by the Court to be of Councel on Record for a priſoner that ſtands Indicted of Felony, yet he ought not to move to have the priſoner Bailed. *Paſc. 24. Car. B. r. For he muſt not move for things againſt Law.*

One

One that is Out-lawed, ought not to be Bailed until either the Out-lawry be Reversed, or else he hath brought a Writ of Error to Reverse it. *Pasc. Car. B. r. For an Out-lawed person is to receive no favour in the Law; for the Law takes not notice of an Out-lawed person as a Subject, but as a Rebel.*

One single Judge will not Bail a prisoner in a difficult case, but will advise with his Companions. *Pasc. 24. Car. B. r. So cautious are they not to do any thing against Law.*

One that is in Execution, in custody of the Marshall of this Court is not compellable to find Bail if another Action be brought against him, but if he be in the prison of the Fleet in Execution, and an Action be brought against him in this Court, he must either be removed and committed unto the custody of the Marshal of this Court, or else he must put in Bail to the Action. *Trin. 24. Car. B. r. For when he is in custody, there needs no Bail to bring in his person, for he is intended to be alwayes in Court ready to answer the party; but he that is a prisoner in the Fleet, though he be in prison, yet this Court can have no certainty to bring in his person to appear here; and therefore he must either be committed here, or put in Bail.*

Before a *Supersedeas* be issued forth upon a Writ of Error brought, he that brings the Writt of Error in some cases limited by several Statutes, ought to put in special Bail to pay what shall be due, if the judgment be affirmed. *Trin. 24. Car. B. r. Because thereby he stops execution, and so delayes the Plaintiff, and puts him to extraordinary charges.*

It is not sufficient for the Plaintiffs Attorney only to mark the Roll for special Bail, but he ough also

to give the Defendants Atturney notice that ſpecial Bail is required to the Action. *Mich.* 24. *Car. B. r. For the Roll may be marked without notice, and ſo he know nothing of it, and plain practice is alwaies the beſt, and moſt beneficial for Plaintiff and Defendant.*

Upon a Bail put in upon a Habeas Corpus returnable imediate, if it be in Hill. or Trin. Term, and the Declaration be delivered 8. daies before the end of the Term, then the Defendant muſt plead to enter: but if it be in Mich. Term, and the Declaration be delivered before Cratlin. Anim. or in Eaſter Term before Menſ. Paſc. then the Defendant muſt picadto try the ſame Term. Per Magiſtrum Liveſay, & alios, Paſ. 21. Car. ſecundi Regis.

If the Judgment be reverſed by a Writ of Error which was given againſt the Principal, there may be a ſpecial Writ taken out to diſcharge the Bail. *Mich. 24. Car. B.r. For a diſcharge of the Principal is a diſcharge in Law of the Bail.*

Bail is to be accounted good Bail, which is taken *de bene eſſe*, and before it be filed until it be queſtioned, and diſallowed. *Mich.* 24. *Car. B. r.* Upon examination of it before the Judge. *Hill.* 1649. 11. *Feb. For before that, it appears not that the Plaintiff accepted of it.*

Bail is ſo called becauſe the party bailed is delivered by the Law into the cuſtody of thoſe that are his Bail, and who are to anſwer the party if they do not produce the principal to do it. *Trin.* 1650. *B. R.* 15. *Junii. It is derived of the* French *word* Bailler, *to deliver a thing to another.*

If

If the Plaintiff do not declare againſt the Defendant in three Terms after Bail is put in, the Bail is not chargeable. *Trin.* 1650. 2. *Julii. For then the Defendant is to go only upon common Bail by the Rules of the Court.*

If the Plaintiffs Atturney do only tell the Defendants Atturney, that his Clyent is to put in ſpecial Bail, it is ſufficient; and there common Bail is not to be admitted, although the Roll be not marked for ſpecial Bail. 3. *Feb.* 1650. *B. S. For the notice that there ought to be ſpecial Bail, is the thing required, and the marking of the Roll, is but to give notice.*

If one that lies in Execution do bring his *Audita Querela*, he is Bailable. 7. *Feb.* 1650. *B. R. So held in* Trittons *Caſe. But it muſt be ſpecial Bail.* and 46 64

By a Rule of the Court, the Plaintiffs Atturney muſt receive the Bail given before the Judge, from the Judge himſelf the ſame Term it was put in, upon pain of five ſhillings. 21. *Feb.* 1650. *B. R. For it concerns the Judge to be cautious in taking of Bail, and to ſee that there be no miſcarriage in it.*

When one becomes Bail for another in an Action of Debt, he doth (in Law) aſſume or take upon him to render the body of the Principal, if he be condemned, or elſe to pay the Debt he is condemned in. *Paſc.* 1652. *per Rolle. B r. And if he do either, it is ſufficient to diſcharge himſelf.*

Until a *Capias* be Returned againſt the Principal, the Bail ſhall not forfeit his Recognizance for the Principals not appearance, by the Ancient Courſe of the Court; but at this day by the indulgence of the Court he ſhall not forfeit his Recognizance, if the

Principal come in at any time before the Return of the ſecond *Scire Facias* againſt the Bail. *Trin.* 1651. *B. S. This is in favour of the Bail, and the Plaintiff is not much prejudiced thereby.*

If one that is to be a witneſs in the cauſe be filed for Bail in the ſame cauſe, upon a motion and other ſufficient Bail tendred in his room, the Court will diſcharge that Bail given, and order the Plaintiff to accept of the Bail tendred. This was done in the Caſe of the Lady *Gray. Paſc.* 1656. *Elſe it would be miſchievous to the Defendant, for a Bail cannot be a witneſs, for he is concerned in the cauſe.*

If one be ſued in this Court for ten pounds or above, the Plaintiff may by the courſe of the Court require ſpecial Bail, but if he be ſued for a leſs ſum, common Bail is to be accepted. *For the Law thinks not fit to trouble the Defendant to put in ſpecial Bail for ſo ſmall a ſum.*

Special Bail is not (generally) to be given in an Action of Battery, yet in ſome ſuch caſes, the Court will compel the Defendant to put in ſpecial Bail, *viz.* where they perceive it was a foul Battery, and much dammage done by it to the Defendant; elſe the Action of Battery, is thought a ſlight Action, and not worthy of ſpecial Bail. *For the Bail is given in reſpect of anſwering the Plaintiff his dammages which may require ſpecial Bail.*

In the Caſe of *Oſborn* againſt *Chaworth*, *Paſc.* 1657. it was ſaid by *Glyn Chief Juſtice*. That if the Defendant doth tender ſufficient Bail to the Plaintiff, and he will not accept of it, that the Court upon examination of the matter, and finding the Bail to be ſufficient, may take it and allow of it whether the Plaintiff will or no. *For the Court is an indifferent Judge betwixt the parties.*

If

If there be no Writ in the Roll, nor any notice given for ſpecial Bail, and common Bail is filed, the Plaintiff cannot by the courſe of the Court, require ſpecial Bail. By *Rolle Chief Juſtice. For it was the Plaintiffs fault he had no other Bail.*

Bail is not to be accounted Bail (properly) until it be filed, for then and not before it is upon Record. By *Roll. Chief Juſtice.* Viz. *ſo as the Court may take notice of it.*

If the Defendant put in Bail before a Judge, and it is allowed, and yet he will not file it, the Plaintiff may if he will at his own charge file it. By *Rolle Chief Juſtice. Paſc.* 1655. *to avoid Error, otherwiſe it might be miſchievous to the Plaintiff.*

In the Caſe of *Walker* againſt *Bury Trin.* 1658. by *Glyn Chief Juſtice*, the Defendant cannot change his Atturney without leave of the Court, *Q. tamen*, and whether the Plaintiff may do it. It ſeems not. *Nam eſt eadem in utriſque.*

If Bail be taken by the Judge, *de bene eſſe*, the Plaintiff ought by the Rules of the Court, either to allow the Bail, or to ſhew cauſe to the contrary. By *Rolle. That if it be good, he may be forced to accept it, or if it be not, that the Defendant may provide better Bail.*

The ſufficiency or non ſufficiency of Bail ought to be firſt examined by the Judge at his Chamber, before the Court is to be troubled with the matter; for the Court is not to be troubled in ſetling of matters of ordinary proceedings, but if the Judge cannot make the Plaintiff and Defendant agree in the giving and taking of the Bail, then the Court is to be moved

in

in it; whereupon they will order both parties to attend and the Bail also, and will examine the cause of Action, and the Bails sufficiency, and settle the matters in difference according to reason. By *Rolle Chief Justice; which both parties must abide by.*

By the new Rules of this Court, an Atturney ought not to require special Bail to his Action, except the Cause of his Action doth by the Rules of the Law require it.

By *Glyn Chief Justice*, If one be brought into this Court by a *Habeas Corpus* and doth put in Bail here, that Bail is lyable to all Actions, which this Plaintiff, at whose Suite he is brought in, wherein he shall declare against the Defendant at any time within three Terms next after, but not afterwards. *Pasc.* 1656. *B. S. For if there be no Declaration against him within three Terms, he may by the course of the Court go at large upon common Bail.*

The cause of marking the Roll for special Bail in this Court was chiefly, because the cause of Action did not appear upon the Latitat, by which the party was Arrested, but it was to be made appear by the Declaration. By *Glyn Chief Justice. But now the course of the Court is otherwise; for special Bail cannot be required, but where the cause of Action is contained in the Writ, and in the Common Pleas where they proceed upon an Original, the cause of Action doth appear, and so there is no need of marking the Roll for special Bail.*

If Judgment be affirmed upon a Writ of Error in the Exchequer Chamber, no Execution shall go against the Bail in the Original Action for the cost

coſts taxed Occaſione Dilationis, Per Magiſtrum Liveſay & alios &c. Paſc. 21. Caroli ſecundi Regis.

Burglary.

Burglary may be committed by one, though he do not break a houſe open, for if he be within the houſe, and ſteal away the goods in the houſe, and open the houſe on the inſide, and go out and carry away the goods, this is Burglary. *Trin.* 22. *Car. B. r. For this is in Law a violating of the houſe, and depriving of the Dweller of his ſafetie in it.*

Bankrupt.

He that is a Bankrupt to one Creditor, is accounted (in Law) to be a Bankrupt to all. 22: *Car. B. r. For he is a Bankrupt in reſpect of himſelf and his Eſtate, and not in relation to any particular perſon only.*

He that is once adjudged to be a Bankrupt, is to be alwaies accounted to be a Bankrupt. 22. *Car. B. r. As to the reſt of his Creditors when he was ſo adjudged to be.*

If one ſhall with an intent to ſupport the credit of a Bankrupt, ſuffer him to have his goods in cuſtody, and to diſpoſe of them, the property of theſe goods ſhall be accounted to be in the Bankrupt, and the true owner of the goods ſhall loſe the property in them. 18. *Ap.* 1501. *B. Sup. As a puniſhment for his falſe dealing herein, and of the miſchiefs which may grow by ſuch devices to evade the Laws. For*

the

the Law cannot take notice of ſuch private things dom between the parties, but will judge of things as they appear to be.

Breach.

Where one brings an Action for a Covenant broken, he ought to Aſſign the breach of it in ſuch manner that the Defendant may juſtifie or take an Iſſue. *Hill.* 22. *Car. B. r. Elſe the party can make no defence for himſelf, becauſe his charge is incertain.*

If one bring an Action of Covenant againſt another, for not repairing houſes, *&c.* demiſed unto him, he ought to Aſſign particularly wherein the want of reparations do conſiſt, and not to declare generally. *Hill.* 22. *Car. B. r. For reparations do conſiſt of particulars; and if they be Aſſigned generally, for want of them, the Defendant cannot tell how to give an anſwer.*

If an Action of Debt be brought upon an Obligation for breach of the condition thereof, the Plaintiff is not to Aſſign in what the breach is, untill the Defendant hath pleaded performance of the condition. *Hill.* 22. *Car. B. r. For before ſuch Plea, the Declaration ſhall be taken to be true that the condition is broken either in all or in part, and ſo there needs no aſſignment of a breach.*

Bailiff.

A Bailiff may execute a Writ out of the Hundred where he is Bailiff. *Paſc.* 23. *Car. B. r. For he is Bailiff all the County over, if he be the Sheriffs Bailiff, and not a Bailiff of ſome Liberty within the County.*

A

A Bailiff is a ſervant or miniſter of the Law, and by conſequence he is a ſervant to the party, at whoſe Suite he is to Arreſt any one, *Paſc.* 24. *Car. B. r. And therefore is anſwerable to the Law, and to the party for miſcarriages in his place.*

A Sheriffs Bailiff is not an Officer of the Court, but the Sheriff himſelf is the Officer that the Court takes notice of. *Paſc.* 24. *Car. B. r.* 2.

Bargain and Sail.

A Bargain and Sail made by one who is not in poſſeſſion, though it be by Deed inrolled, is not good if there be no Livery thereupon. *Mich.* 23. *Car. B. r. But if there be Livery it paſſeth, for the making of the Livery ſuppoſeth him in poſſeſſion.*

If one buy a thing of another, he that buyes it ought to pay the money he hath agreed to pay for it, before the feller of it is bound to deliver it. *Paſc.* 23. *Car. B. r. For that is the contract betwixt the buyer and the ſeller, I will give you ſo much mony, and you ſhall give me ſuch a thing; and what difference may be betwixt buying of a thing for mony, and chartering or exchanging one thing for another.*

One may upon a good conſideration, diſſolve by Parol onely an abſolute Bargain. *Paſc.* 24. *Car. B. r.*

One may ſell his priviledge given him by the Law as his birthright, as a free-born ſubject, for a good conſideration. *Trin.* 24. *Car. B. r. For it ſhall be intended that he hath a ſufficient recompenſe for it, and he hath no wrong done him by it; but Q. what priviledges he may ſell.*

If one that is indebted, do really and *bona fide* ſell his

his Lands, though it be with an intent to avoid the paiment of his Debts; this sale is good, if the Vendee be not privy to his intent. *Mich.* 24. *Car. B. For as to the Vendee there is no fraud in the Case, and he comes to the lands upon a valuable consideration.*

If one Bargain and Sell Lands, of which another is in possession, and claims title to them, this Bargain and Sail is not good. *Trin.* 1651. *B. S. Because it is a litigious title, the buying where the Law doth not allow. For this would be a means to nourish Suites in Law, and the end of the Law is to settle peace, and quiet possessions, and not to disturb them.*

Battery.

To lay ones hands lightly or gently upon another, though he have no occasion so to do, is no Battery to ground an Action upon. *Trin.* 24. *Car. B. r. For the Law will not presume the party is damnified by the doing thereof, and so hath no right of an Action.*

Bill.

There is difference betwixt an Inland Bill of Exchange, and an Outland Bill of Exchange, which is made to return moneys beyond the Seas; for an Inland Bill is but in nature of a Letter, but an Outland Bill is of another nature and more regarded in the eye of the Law. 3. *July* 1650. *B. S. Because it is more for the advance of the trade of the Nation with other Countries, and is therefore of more publick concernment.*

Book

Book.

When Books are delivered to the Judges, in cauſes which are to be argued; the Attorneys that deliver the Books, ought to write the number Roll of the Caſes to be argued upon the Book, otherwiſe they will not receive them. *Mich.* 22. *Car. B. r. That they may know in what year and term, the cauſes were entred, that they may have recourſe to the Records of thoſe caſes upon any occaſion.*

The Books which are to be delivered to the Judges of cauſes to be argued, are to be made at the equal charge of the Plaintiff and Defendant. *Paſ.* 23. *Car. B. r. For the Law being doubtful in ſuch Cauſes which are to be argued, whether it be on the Plaintiffs ſide, or on the Defendants; the arguing of the Caſe doth equally concern them, and therefore it is Reaſon they ſhould be at an equal charge in bringing the cauſe to be argued and determined.*

When Books are to be delivered to the Judges, in cauſes which are to be argued; the Plaintiff ought to give Books to the Seignior Judges, and the Defendant ought to give Books to the puiſne Judges. *Hill.* 1649. *B. S. But it matters not by whom the Books are delivered, ſo they have all of them Books delivered.*

Courts and their Juriſdiction.

THE Court of the Kings Bench, is a high Court where the Pleas of the Crown are agitated, and tryed, *viz.* all manner of Treaſons, Miſpriſions of Treaſons,

Treaſons, Felonies, *&c.* and this by the Common Law, without any Patent or Commiſſion, and the King is intended by Law to ſit there.

In this Court is alſo Tryable all Offences *Contra Pacem*, or *Vi & Armis*, and all Perſonal Actions.

This Court is removeable at the Kings pleaſure.

In the Kings Bench the Pleas are held *coram ipſo Rege*; and therefore it is the Kings moſt high Court, and above the Chancery.

The Kings Bench may command a Priſoner out of any other Court by *Habeas Corpus cum Cauſa*, before them, though he be in the Tower upon the Privy Councels Command.

Cardinal *Wolſey* being Chancellour of *England* committed one to the *Fleet*, who was brought into this Court by a *Habeas corpus cum Cauſa*, and a day given to the Kings Atturney to ſhew why he ſhould not be delivered, and the party after two daies was diſmiſſed.

Gaſcoigne Chief Juſtice committed the Prince becauſe he would have taken a Priſoner from the Barr.

The Court of *York* hath no power to award a *Capias* in an Action upon the Caſe, by the Statute of 14 *H.* 7. *Hill.* 21. *Car. B.r.* vid. *the Statute.*

Inferiour Courts ought not in pleading to ſhew a thing by implication, but they muſt ſet it out expreſly, and alſo *Surpluſage* in an inferiour Court will make error, for they muſt keep their forms preciſely. *Hill.* 21. *B.r. For if they ſhould be ſuffered to break their forms, it would introduce all barbariſm and confuſion, which the Law doth labour to prevent as things deſtructive to the Realm.*

If

If a condition of an Obligation for the payment of money, do expreſs no place where the money is to be paid; if the Obligee bring an Action of Debt upon this Obligation for non-payment of the money according to the Condition of this Obligation, he muſt make it appear that the money was to be paid within the juriſdiction of the Court, where he brings his Action, or elſe the Action is not well laid. *Hill.* 21. *Car. B. r. For it is brought* coram non Judice *for ought doth appear.*

The juriſdiction of an inferiour Court muſt be ſet forth, and by what authority it is held, whether by Preſcription or Letters Patents, otherwiſe it is Error. *Hill.* 21. *Car. B. r. For every inferiour Court muſt be held one of thoſe waies; and if no authority be ſet forth this Court will not preſume there is any.*

The Court of Admiralty cannot hold Plea of a matter ariſing from a contract made upon the land, though the contract was made concerning things belonging to the Ship. *Hill.* 21. *Car. B. r. For ſuch matters are only tryable by the Common Law, and though the contract concerns things belonging to Sea affairs, yet this is but collateral, and the principal direct matter to ground the action upon is the contract.*

In the year of 4. *H.* 4. there was a petition preferred in the Parliament againſt the Court of Admiralty for holding of Pleas by the Spiritual Law, which they ought not to do, but by the Laws of *Oleron*, and ſo it was held by the Houſe of Commons in Parliament at that time. *Hill.* 21. *Car. B. r. The Laws of* Oleron *were particular Laws made at* Oleron *an Iſland belonging to* France *touching Maritime cauſes.*

If goods delivered a Ship-board be embeziled, all the Mariners ought to contribute to the ſatisfaction of the party that loſt his goods; every one of them particularly according to their proportions, by the Maritime Law or Cuſtome, and the cauſe is to be tryed in the Court of the Admiralty; and in ſuch caſes no prohibition ought to be granted. *Hill.* 21. *Car. B.* r. *Becauſe the matter ariſeth ſolely upon a Maritime cuſtome, whereof the Common Law cannot take notice.*

The Court of Admiralty ought not to try whether a fact were done in a place which is comprehended within a League made with a Forraign Prince, or whether the place be without or not, nor ought to try whether the League were made at the time of the fact done or no. 21. *Car. B.* r. *Becauſe the League may be traverſable and iſſuable at Law.*

No Court can ſet a fine upon any perſon, for ſuch an offence committed by him, for which they cannot grant him a pardon for his offence, when he hath paid the fine that is ſo ſet upon him. 21. *Car. B.* r. 4. *H.* 7. 5. 21. *H.* 7. 35. *For the Fine is paid in lieu of ſatisfaction for the offence, and it is reaſon that the party upon his ſatisfaction made, ſhould have a diſcharge for his offence committed; or elſe he may be called in queſtion again for the one and the ſame offence.*

The Court ought *Ex officio* to take notice of matters contained in the Record of the matter depending before them, but they are not tyed to ſearch the Almanack to compute the times of doing things. 21. *Car. B.* r. *For that ought to be ſet forth by the parties.*

An inferiour Court ought to Return a Writ direct-

ed

ed to them to ſtop their proceedings, although they be not bound to allow the Writ directed to them by giving obedience unto it, and in their Return of the Writ they are to ſhew, why they do not allow it, but do proceed notwithſtanding the Writ directed unto them. 22. *Car. B. r. That they may not ſeem to contemn the Authority above them, otherwiſe an Attatchment lies againſt them.*

If a Court which hath no Juriſdiction of the cauſe depending in that Court do proceed to Judgment in it; the Judgement is good if the Defendant did not plead to the Juriſdiction of the Court, but admitted it to have juriſdiction of the cauſe, by making his defence, but Q. if it be not Error upon a Writ of Error brought. 22. *Car. B. r. Which was (once) in his power to allow or diſallow, as he pleaſed; but not having diſallowed it when he might, he ſhall be judged to have allowed the juriſdiction, and it ſhall be preſumed that the Court hath done juſtice to the parties, although they had legally no conuſance of the Cauſe.*

Although one plead in diſallowance of the juriſdiction of a Court, yet he may (afterwards) come in and allow the juriſdiction and plead there. *Mich.* 22. *Car. B. r. For the Plea is not peremptory, but dilatory, and may therefore be waived.*

The Court of the Kings Bench, is to regulate all the Courts of Law throughout *England*, that they do not exceed their juriſdictions nor alter their forms. 22. *Car. B. r. For it is the higheſt Court of Judicature in* England, *being held* coram ipſo Rege, *who is* Fons Juſtitiæ, *and the other Courts are but as ſtreams flowing from this Fountain.*

In ſome caſes the juriſdiction of the Courts of the

Cinque Ports extendeth upon the high Sea. *Mich.* 22. *Car. B. r. This is by ſpecial priviledges afforded them in regard of their great ſervices they are bound upon occaſion to perform for the Realme.*

This Court may commit an Atturney, for doing of things againſt the expreſs Rules of the Court, and notice of it. 22. *Car. B. r. For this is a contempt to the authority thereof.*

This Court may iſſue out a Writ, to compel one that is elected to the Office of Conſtable, and refuſeth to ſerve, to take his oath and to execute his Office. *Mich.* 22. *Car. B. r. For where ordinary means will not ſerve to remove obſtructions in the government of the Common-wealth, this Court may interpoſe.*

The ſuperiour Courts at *Weſtminſter*, and the inferiour Courts elſewhere, do differ in their forms in proceedings in many things. *Mich.* 22. *Car. B. r. But this is not true of all inferior Courts, for ſome of them do uſe the ſame forms as are uſed in the Courts at* Weſtminſter.

A Court that holds Plea by vertue of Letters Patents, ought to proceed according to the Courſe of the Common Law; for no Patents ought to be granted againſt the Courſe of the Common Law, but Courts that are Courts by Cuſtom, are not bound to proceed according to the ſtrict Rules of the Common Law; but may proceed according to their cuſtom. *Mich.* 22. *Car. B. r. So that their Cuſtoms be not contrary to Law.*

1 Rep. 55. b

One may ſue in the Kings Bench Court, Actions upon the Caſe and Treſpaſs by Original, as well as he may by Bill of *Middleſex* or Writ of Latitat; but the common and moſt uſual way of proceeding is by Bill. *Mich.* 22. *Car. B. r.*

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A County Court cannot enquire of dammages ariſing out of the juriſdiction of it. *Hill.* 22. *Car. B. r. For it hath not conuſance of things ariſing out of his juriſdiction.*

One ought not to Sue to Baſtardiſe an Iſſue, in the Eccleſiaſtical Court, but the tryal lies at the Common Law.

Whether a Wife or not a Wife, is tryable at the Common Law; but whether lawfully married or not lawfully married, is tryable in the Spiritual Court. *Paſc.* 23. *Car. B. r. For a marriage is pleaded to be according to the Laws of the holy Church*, viz. *the Eccleſiaſtical Laws; and therefore moſt proper for them to determine whether the marriage were ſolemnized accordingly: but whether married or not married, is tryable at the Common Law, for that is matter of fact, and not matter of the Spiritual Law, and ſo not determinable by the Judges thereof, no more than matters of Spiritualty are tryable by the Judges of the Common Law.*

Where the principal matter is tryable in the Spiritual Court, and there is (alſo) a thing incident to this tryal, which is tryable at the Common Law, yet a Prohibition ſhall not there be granted, *Paſ.* 23. *Car. B. r. Quia principale, trahit ad ſe acceſſorium ſuum. And the principal matter being tryable in the Spiritual Court, the Common Law is not to intermeddle, for this would obſtruct juſtice.*

A Recognizance in the Common Pleas is entred ſpecially, but a Recognizance in the Kings Bench, is entred generally. *Paſc.* 23. *Car. B. r. The difference betwixt a general entry and a ſpecial, I conceive is, that a general entry is more ſhort, and a ſpecial entry is more large and plain; yet the ſubſtance is ſufficiently entred in the general entry.*

In the Univerſities they hold Pleas by cuſtom, and do proceed according to the Rules of the Civil Law. *Paſc.* 23. *Car. B.r. Such proceedings ſuite beſt with them becauſe the Civil Laws are written in Latin, and the Civil Law is there only ſtudied.*

In the Court of the City of *Exeter*, they proceed in that manner as they do in the Common Pleas, but they do not ſo generally in other inferiour Courts. *Paſc.* 23. *Car. B. r. But in* Norwich *they proceed as they do at* Exeter, *agreeing with the Common Pleas.*

The Common Pleas doth not ſhew at large, whence the *venue* ſhall come, but inferiour Courts ought to ſhew it at large, and not with an *&c.* as the Common Pleas doth. *Paſc.* 23. *Car. B. r. For they uſe to ſhew it at large, and they ought not to vary from their forms.*

The Court of the publick Exchequer is a mixed Court, and doth conſiſt of Law and Equity. *Paſc.* 23. *Car. B. r. The Pleas ſide is for matters of Law, and the Chequer-Chamber for matters of Equity. In the Pleas ſide they proceed in Latin, and in the Chequer-Chamber by Engliſh Bill anſwer &c. as in Chancery.*

The Court of the Kings Bench, is a Court of Eyre in that County whereſoever it ſits. *Trin.* 22. *Car. B.r. For it is not a fixt Court as the Common Pleas Court is, but removeable; and it is alſo ſuch in regard of the large extent of juriſdiction in the conuſance of all matters either Civil or Criminal which it hath in that County where it ſits.*

The Court of the Common Councel of *London*, is not a Court of Record; but only a Court of advice, and therefore neither a Writ of Error,

nor

nor an Attaint doth lie for matters done in that Court. *Trin.* 23. *Car. B. r. For there are no Civil matters ariſing between party and party tryed there; but onely advice taken by them amongſt themſelves touching redreſſing of things amiſs in, and making of Laws for the better governing of the City.*

One ought to ſpeak againſt the juriſdiction of the Court, by pleading to it, and not by ſpeaking in Arreſt of Judgment, *Mich.* 23. *Car. B.r. for then it is too late; for the party by pleading to iſſue hath allowed the juriſdiction, and the not having juriſdiction of the cauſe is no ſufficient matter to arreſt Judgment upon after tryal.*

The Palace Court, is a Court in the Aire, and annexed to no Corporation, nor is beneficial to any ſociety of men; and from the Tunnel of *White-hall*, and twelve miles from thence in compaſs is called the Palace Court. By *Rolle Chief Juſtice. Mich.* 24. *Car. B. r. Originally it had conuſance only of matters in difference ariſing amongſt the Kings Menial ſervants, but afterwards by corruption it extended its power much further, to the grievance of the people.*

The Statute of Jeofails doth extend to inferiour Courts, if the Errors in their proceedings cannot be amended by the comparing of their Papers or ſuch other matters, for it is a beneficial Law, and to be (therefore) largely expounded. *Paſc.* 24. *Car. B. r. For*, Omne Bonum eſt ſui diffuſivum,

A Court cannot be held by Cuſtome, and by Letters Patents alſo, for if one have a Court by Cuſtom, and he Purchaſe Letters Patents, and holds the

Court by them, the Cuſtom is extinguiſhed. *Mich.* 24. *Car. B.r. By interrupting it, and holding the Court by another authority.*

This Court hath authority to reform abuſes in the behaviour and carriages of all perſons whatſoever, throughout all *England. Hill.* 1649. *Feb.* 9. *B.S. And upon good reaſon for the civil and orderly deportment of men in their ordinary converſation, doth tend very much to the maintenance of the publick Peace, with which this Court is principally intruſted with.*

The Parliament cannot take away the juriſdiction of this Court, without words in the Negative, that is, that it ſhall not do thus or thus. 10. *Feb.* 1650. *B.S. For if it only ſay, it ſhall do ſo, or ſo, the Court may do what is enjoyned, and alſo what it might have done before, for here is no reſtraint.*

This Court is not to be open more than two dayes after the Term for Demurrers and Pleas, and but three dayes for Iſſues. *Trin.* 1651. *B.S. For that is time enough to diſpatch ſuch buſineſs.*

All Courts of Record are originally the Kings. *Mich.* 1651. *B S. And derived from him as the Fountain of all Juſtice.*

Corporation.

If a Corporation do become ſo poor, that it is not able to defray the publick charges, which are incident unto it as it is a Corporation; it is fit that the Corporation be ſeiſed into the hands of the King. *Hil.* 21. *Car. For the Corporation becomes uſeleſs and diſhonourable to the Realm.*

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If a Corporation doth neglect to elect ſuch Officers as they ought to elect by their Charter, or if they make a falſe election not warranted by their Charter; this is a forfeiture of their Corporation. *Hill. 21. Car. B. r. For the Charter doth imply conditions in Law for them to perform, and not performing them, the Charter is forfeited.*

The Corporation of the City of *London* is to anſwer for all particular miſdemeanours which are committed within any of the Courts of Juſtice within the City; and for all other general miſdemeanours committed within the City. *Trin. 22. Car. B. r. So I conceive it is of all other Corporations; if it ſhould be otherwiſe, the intent of their Charter which is for the good government of the City, would prove pernicious and deſtructive to the Realm.*

A Body Politick is a creature of the King, created by Letters Patents. *Hill. 22. Car. B. r. For though a Corporation may be by preſcription, yet it ſhall be intended, that ſuch a Corporation did (originally) derive its authority by grant from the King. For the King is the head of the Common-wealth, and all the Common-wealth in reſpect of him is but as one Corporation, and all other Corporations are but as limbs of a greater body.*

Coſts and Charges.

No Coſts ought to be paid for the putting off of a tryal, where no fault was in the party againſt whom it is moved for Coſts. *For Coſts are only to be paid by ſuch perſons which by their occaſion have cauſed the other party to have been at extraordinary charges.*

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An Attatchment lies againſt the party that refuſeth to pay Coſts which are taxed by the Maſter of the Office. 21. *Car. B. r. According to the Rule of the Court. For it is a contempt to the Court, not to obey the Courſe of proceedings uſed there.*

Trin. 1657. by *Glyn. Chief Juſtice*, If a reference be made to the *Secondary*, and he makes his report; if either of the parties being not ſatisfied obey not a ſecond reference, and the ſecond report be made alſo as the firſt was againſt him, the Court will award extraordinary coſts againſt him for his vexation and delay.

If a Juror be withdrawn (upon a tryal) by the conſent of the Plaintiff and Defendant, they ſhall pay the coſts of the Jury equally between them. *Trin.* 22. *Car. B. r. For if one of the parties (alone) ſhould pay the Coſts, upon bringing the Iſſue (again) to be tryed by the ſame Jury, as the courſe is ſo to do, it would be a ſufficient matter for him that did not joyn in paying the coſts, to challenge the Jury for favour to him that did pay the coſts.* Trin. 22. Car. B. r. *In regard of the money received of one party only, which may move them to favour that party more than the other from whom they received nothing.*

If upon a tryal, the Plaintiff be forced to be non *Suit*, becauſe his witneſſes did not appear, he may by Action recover his coſts expended againſt his witneſſes that do not appear. *Mich.* 22. *Car. B. r. By the Statute of* 5. *Eliz. C.* 9. *&* 29. *Eliz. C.* 5.

It is at the Election of the Defendant, if the Plaintiff do amend his Declaration, either to accept of coſts and to plead, or elſe to refuſe coſts and to Imparle unto the next Term and not to plead. *Mich.* 22. *Car. B. r. The Defendant upon ſuch amend-*

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ment is to have coſts, becauſe thereby he may be cauſed to take new advice of Councel what to plead, and then he muſt plead, and he may Imparle, becauſe by the amendment, it may be, time may be required for him to adviſe what to plead.

The taxing of Coſts is the Act of the Court, although they be taxed by the Secondary of the Office. *Mich. 22. Car. B. r. For the Secondary is but the Officer of the Court, and an inſtrument imployed by the Court for ſuch purpoſes, and therefore the Court may alter the coſts Taxed if they ſee cauſe, but in ordinary caſes they uſe not to do it.*

And the Caſe of *Style* and *Atwood. Paſc. 1656. B. S.* upon a motion made to moderate coſts taxed by *Herne* the Secondary, *Glyn Chief Juſtice* ſaid, That he had ſometimes moved to encreaſe coſts, and ſometimes to diminiſh coſts taxed by the Officer of the Court, but could never have his motion granted, and therefore would make no Rule here.

Coſts more than ordinary ought not to be Taxed until the Atturneys on both ſides be heard for their Clyents before the Secondary. *Mich. 22. Car. B. r. Except it be where either of the Atturneys doth neglect to appear before the Secondary, having notice thereof; and there it ſhall be preſumed he hath nothing to ſay for his Clyent in mitigation of Coſts.*

If an Endictment, taken in any County, be removed by *Certiorary* into the Kings Bench; and the Court be moved, that it may be ſent back again into the County where it was taken, and if the Court (upon good cauſe ſhewed) do order it accordingly; it ſhall be removed back again, at his coſts who deſired it to be removed. *Mich. 22. Car. B. r. For it*

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ſhall be intended, that the removing of it is for his benefit and eaſe; and therefore it is reaſon he ſhould bear the charge.

When upon a tryal the Plaintiff becomes *non-ſuit*, the Defendant muſt pay the Jury their Coſts. *Mich. 22. Car. B. r. For it is intended he receiveth benefit by the non-ſuit.* Qui ſentit commodum ſentire debet & onus.

If there be any ſuch fault in the entring of a ſpecial verdict, ſo that it muſt be amended, the Plaintiff or Defendant, who was the occaſion of making the fault, muſt pay the Coſts for the amending it. *Mich. 22. Car. B. r. if it be ſuch a fault that Coſts muſt be expended to amend it; for it is not reaſon that the other party ſhould pay for his error.*

If a tryal at the Bar be put off in favour of the Plaintiff or the Defendant, and the party that was not the cauſe of putting it off, be compelled by putting it off to keep his witneſſes in Town, he that cauſed the tryal to be put off, ſhall pay ſuch coſts for keeping them in Town, as ſhall be taxed by the Secondary. *Hill. 22 Car. B. r. For he is in ſuch caſes to be Moderator betwixt both parties, that things may indifferently be carried betwixt them.*

If one will give leave to another to ſue in his Name, he that grants the leave ſhall pay the Coſts of the ſuit. *Hill. 22. Car. B. r. For he is the perſon upon record, of whom the Law takes notice of, and the Court takes no notice of the private agreement between the parties; but intends that the party whoſe name is uſed in the ſuit is the party that is to gain or loſe by it.*

Coſts are not to be allowed for unreaſonable motions

tious, but only for ſuch as the party was neceſſarily put unto by the courſe of the Court. 22. *Car. B. r. For the Law as it will not do unreaſonable things, ſo neither will it countenance thoſe which do them.*

Arbritrators are to make the Writings touching their arbitriment, at their own proper Coſts; and ought not to award, that the parties that ſubmitted to the award, ſhall pay for them. *Paſc.* 23. *Car. B. r. For this is no part of the ſubmiſſion, but a charge that ariſeth after it, and which the Arbitrators have taken upon themſelves.*

Where the Judges of the Court do deſire to have Bookes of the Cauſe depending before them, to be adviſed of the matter in Law the better, by conſidering of the pleadings; the Plaintiff and the Defendant ought to joyn in the Coſts, for the copying of the Books to be delivered to them. *Trin.* 23. *Car. B. r. For they are equally concerned in the Cauſe depending, and therefore it is reaſonable they ſhould be at an equal charge in bringing it to a concluſion.*

It is the courſe of the Court, to refer the taxing of the Coſts to the Secondary of the Office, and not to make any ſpecial rules for ſuch matters. *Mich.* 23 *Car. B. r.* Viz. *In ordinary caſes, but in extraordinary the Court will ſometimes make a rule for it.*

No Coſts are to be allowed upon a Repleader. *Mich.* 23. *Car. B. r. For both the parties were in fault, to ſuffer ſuch an inſufficient iſſue to be joyned, and neither part ought to have coſts of the other.*

Alſo where the Defendant demurrs to the Plaintiffs Declaration, and the demurr is adjudged good, the Defendant ſhall not be allowed his Coſts, becauſe it is out of the Statute.

It is not neceſſary that the Jury ſhould give coſts, but they may leave it to the Court to do it, *Mich.* 23. *B. r. For the Court is beſt able to judge what coſts are fit to be given.*

Upon a Judgment upon a *Nihil dicit* in debt in the Common Pleas, that Court will give coſts and dammages generally. *Trin.* 24. *Car. B. r.*

If there be a ſpecial Verdict found in a *Replevin*, the coſts and dammages ſhall be given, either againſt the replevyer, or againſt the avowant, as the iſſue ſhall be found for, or againſt them. *Paſc.* 24. *Car. B. r. Upon Judgment given upon Argument upon the matter in Law.*

The Court will not order any thing concerning the encreaſing or mitigation of coſts, but the parties are to attend the Secondary in it, and to abide by his order. 13. *Nov.* 1650. *B. S.* Except it be in extraordinary caſes. *And there the Court is to be moved, and is to direct the Secondary, for he is not to vary from the ordinary Rules of proceeding without the expreſs direction and rule of the Court.*

If a Juror appear upon a tryal which is to be at the barr, and the Jury is adjourned, and he doth not again appear, at the day of adjournment he ſhall have no Charges allowed him for his former appearance. 2. *May.* 1651. *B. S. For his former appearance was to no purpoſe, nor is beneficial to any body, nor the end for which he was ſummoned ſatisfied.*

By *Glyn Chief Juſtice, Paſc.* 1658. It was ſaid, That it is the courſe of Common Pleas to make the Leſſor of the Plaintiff in an Action of Treſpaſs and Ejectment to pay the coſts of the Suite, if it go againſt the Plaintiff, and therefore he made it a Rule that it

ſhould

should be so in this Court, which is now generally observed. *Mich.* 13. *Car.* 2.

Chancery.

A Master of the Chancery, hath not power to take an Oath, but in a Cause which is depending in the Court of Chancery. 21. *Car. B. r. If he do it, it is taken* coram non Judice, *and is of no validity, and it hath been so adjudged.*

The Chancery is not a fixt Court; neither in respect of the place where it sits, nor of the time when they may sit; for they may sit out of the Term, and in what place they please. 12. *Nov.* 1650. *B. S.* By *Rolle* Chief Justice. *Though generally they do it not, but sit principally in Term time, and at* Westminster.

Capias.

There must be 7. daies exclusive betwixt the Teste and Return of every to warrant a Scire Facias against Bail, and that the Capias ought to be delivered to the Sheriff 4. daies before the return is past. Per Magistrum Livesay, Pasc. 21. Car. 2. Reg.

A *Capias*, duely sued out, may be filed afterwards. 21. *Car. B. r. For the filing of it is not of the essence of the Writ but that the Court, and the Defendant may the better take notice of it.*

Challenge.

When the Jury appear at a Tryal, before the Secondary calls them particularly by Name upon the panel,

panel, to be ſworn: he bids the Plaintiff and Defendant, to attend their Challenges. 21. *Car. B. r. For afterwards it is too late to challenge, for then they are to be ſworn.*

It is not a ſufficient cauſe to challenge a Juror, becauſe he had delivered his opinion touching the title of the Land in queſtion. *Paſc.* 23. *Car. B. r.* 2. *tamen*; *for it ſeems he is not indifferent, yet his opinion may be altered upon the having of evidence whereby he may be better informed of the matter of fact than he was before.*

Upon a tryal at the Bar betwixt *Hariſon* and *Ley Paſc.* 1657. *B. S.* a Juror was challenged for the Plaintiff, and the Defendants Councel conſented *que ſoit tret*, and after the Plaintiff would have waived his Challenge, and it was queſtioned whether he might do it, though it was before all the reſt of the Jurors were called upon the panel. But at length it was permitted, it not being much inſiſted upon: yet in the Caſe of *Arnold* and *Bell* the ſame Term, it was ſaid, It could not be done, except both parties conſent unto it. *Vide Mon. Note-Book, nu.* 14.

If one take a principal Challenge againſt a Juror, he cannot (afterwards) Challenge that Juror for favour, and waive his former challenge. *Paſc.* 23. *Car. B. r. For he ſhall not waive a greater challenge to take a leſs.*

If the Defendant do not appear at the Tryal when he is called, he loſeth his challenge to the Jurors, although he do afterwards appear. *Mich.* 23. *Car. B. r. For though he appear not, the Jury is to be called and ſworn to try the Iſſue, and therefore if he appear not at firſt, it will be afterwards too late to take his challenge.*

If

If one Challenge a Juror, and do not make his challenge good, and after the Jury is adjourned; he ſhall not challenge that Juror again at another day, except it be for ſome matter which is hapned ſince the adjournment. *Mich.* 23. *Car. B. r. For a Juror can be but once challenged.*

If one challenge a Juror, he cannot (afterwards) have him to be ſworn, if the Secondary have entred the challenge. *Paſc.* 24. *Car. B. r.* Q. *Whether he may have him ſworn if the challenge be not entred: it ſeems he may waive his challenge and have him ſworn, for his challenge is not upon Record.*

It is a good Challenge againſt a Juror, to ſay that he was a Juror in a former tryal for the ſame Land in queſtion, and upon the ſame title, though the tryal was between other parties. *Mich.* 24. *Car. B. r. For it is probable he will maintain his former Verdict, though the evidence be different.* Q.

When the Array, (that is the whole Jury) is challenged, the Councel of the party that makes the challenge, muſt read his challenge in *French*: and after he hath ſo read it, it is to be delivered to the Secondary, who is to read it in *Latin*. 6. *Nov.* 1650. *B. S. Which was then done in a challenge for want of Hundreders.*

After the fore-man of the Jury is ſworn, the Array cannot be challenged. 6. *Nov.* 1650. *B. S. For then it is too late: for, to challenge the Array, is to challenge the whole Jury, which cannot be done after one of them is ſworn.*

A Challenge to a Jury for favour is not accounted to be a principal challenge. *For favour is an uncertain continuance, and not to be relied on.*

If ſome of the Jury be challenged for favour, they ſhall be tryed by the reſt of the Jury their Compinions, upon their Oaths, whether they be indifferent, to try the matter in queſtion, or not: without going from the Barr, when they have heard all the evidence that is given againſt them by the Councel of the party that takes the Challenge. 1655. *B. S.*

In a Caſe tryed at the Barr, between the Earl of *Leiceſter* and the Lady *Anne Holborne*, a Juror was Challenged, becauſe he was retorned by the Name of *Matthew*, whereas (in truth) his Name was *Mark*, although he was (alſo) called *Matthew*, as he affirmed, being examined upon a *voire dire*, to ſay what his Name was; and upon this challenge the Juror was drawn, and the Jury could not be taken for want of him, but a *tales* was granted. *For, Non conſtabat de perſona.*

It is neither a principal Challenge, nor a Challenge for favour, to ſay that the Juror Challenged, was a ſupernumerary Juror in a former Jury retorned for the ſame parties, in a Cauſe betwixt them, and did receive mony for his charges of the party for whom the Verdict paſſed. *By* Glyn *Chief Juſtice, becauſe he was not ſworn to try the Iſſue, and ſo no Jury man, but as a meer ſtranger.*

Certiorary.

No Certiorary ought to be made to remove a Judgment out of an inferiour Court, at the proſecution of the Plaintiff in the Action, whereby to enable him to have Execution out of this Court to execute the Judgement of an inferiour Jurisdiction. Per Mag. Liveſay, & alios &c. P. 21. Car. 2. Reg.

It

It is not neceſſary to have a Judges hand to a Writ of *Certiorari*, to certifie a Writ of Error. 21. *Car. B. r. For it is Authentick it ſelf and ought to be obeyed.*

A *Certiorari* to remove an Endictment, doth lye by the Courſe of the Court, without moving the Court for it. *Mich.* 22. *Car. B. r. & whether it hold in all caſes.*

After a Writ of Error is brought, there muſt be a Writ of *Certiorari* directed to the Court where the judgment was given, for reverſing whereof, the Writ of Error is brought, to certifie the record into this Court. *Mich.* 22. *Car. B. r.* Viz. *a Tranſcript thereof, for the Record it ſelf is not removed, although by allowing of the* Certiorari, *the hands of the Court are ſo cloſed from proceeding any further upon it, till the Errors be examined, and the Judgment affirmed, in caſe there be no error in it.*

Note, a *Certiorari* is never ſued out after a Writ of Error but where diminution is alledged, for in the Writ of Error is contained a Command to certifie the record and proceſs, *cum omnibus ea tangent'* notwithſtanding what is ſaid before.

By *Glyn Chief Juſtice* in the Caſe of one *Gaſſock*, *Hill.* 56. *B. S.* the Kings Bench Court may grant a *Certiorari*, and remove a cauſe before Judgment out of an inferiour Court, though the cauſe cannot be determined here, if the inferiour Court have no juriſdiction of the Cauſe, or do not proceed therein according to the rules of the Common Law, but if an inferiour Court have juriſdiction and this Court hath not, no *Certiorari ought to be granted. For it would be to no purpoſe to grant it.*

A *Certiorari* to remove an Endictment, is good, although it do bear date before the taking of the Endictment which is to be removed by the *Certiorari*. *Mich.* 22. *Car. B. r. For the date is not material, and it may be granted to remove a ſubſequent Endictment, as well as an Endictment preceeding the* Certiorari.

When a certificate of a Record is made out of an inferiour Court, they ought to make the certificate as they will ſtand to it at their peril, and it cannot be afterwards amended; and if the Record be not truly certified, there lies an Action on the Caſe againſt the party that made the certificate. *Hill.* 22. *Car. B. r. For a Writ of diminution is not grantable to an inferior Court. Q. What remedy the party that brings the Writ of Error ſhall have if an inferior Court do not return the whole Record.*

This Court, will upon motion, grant a *Certiorari*, to remove a Judgment given to an inferior Court, to the intent, that the Plaintiff may have a *Scire facias* againſt the Defendant, to ſhew cauſe, why he ſhould not have execution upon his judgement. *Hill.* 22. *Car. B. r. This was done in the Caſe of* Rooke *againſt* Knight, *to remove a judgment given in* Dymchurch, *part of one of the Cinque Ports in* Kent: *This is done in caſe the ordinary way of taking out of Execution be hindred in the inferiour Court, or where they refuſe to grant out execution; for this Court is the ſupreme Court of Juſtice to appeal unto in extraordinary Caſes; but there is a Rule made lately, that forbids any ſuch* Certiorari *to be made.*

The Juſtices of Aſſize may certifie to this Court, if a Jury do find a Verdict againſt the evidence given them. *Paſc.* 23 *Car. B. r. That Judgment may not be*

be ſpeedily entred upon ſuch a Verdict, for ſuch Verdicts are not favoured in Law.

It was doubted, whether a *Certiorari* do lie to the Cinque Ports. *Paſc.* 23. *Car. B. r. Notwithſtanding, it was done in the Caſe of* Rooke *and* Knight *before cited. For if it ſhould ordinarily be granted, it would much leſſen their priviledges, and put thoſe that dwell within ſuch juriſdictions to extraordinary trouble and charge.*

If one party pray a *Certiorari*, and have it granted, the other party cannot have another *Certiorari. Paſc.* 23. *Car. B.r.* viz. *For the ſame thing; for the ſecond* Certiorari *would be to no purpoſe, and the Law will not have things done in vain.*

If there be cauſe to certifie the Court touching a cuſtome uſed in the City of *London*, this certificate is not to be made in writing, but the Recorder of *London* is to certifie the Cuſtom to the Court, *ore tenus*, or by word of mouth; for the Recorder is intended to be beſt Conuſant of the Cuſtom, and he is alſo intended to be alwaies in *London*; and therefore it is for the greater dignity of this Court, that he attend in perſon to give ſatisfaction herein, than to make a certificate, which will alſo require witneſs to prove it, and ſo more trouble and delay in it. *Trin.* 23. *Car. B.r.* But not if the Cuſtom doth concern the Lord Major particularly. *By* Rolle *Chief Juſtice.* 2. *rationem differentiæ.*

When Juſtices have authority given them by a Statute within a Liberty; a *Certiorari* lyes to them if the Liberty be not excepted. *Hill.* 23. *Car. B.r. For a* Certiorari *being grantable at the Common Law is of force as well within Liberties as without,*

except where a liberty is exempted by ſome Statute.

A *Certiorari* ought to be granted upon a matter in Law only, and not upon a matter of fact. *Paſc.* 23. *Car. B.r. For matters of Law only are diſputable by the Court, and matters of fact by Juries.*

Out of an inferiour Court, the original Record ought to be certified into this Court upon a Writ of Error brought to reverſe their judgement: but the Common Pleas do only certifie a tranſcript of the Record before them, *Trin.* 24 *Car. B. r. Q. rationem differentiæ.*

The Prothonotaries of the Common Pleas will not make a certificate of any matter before them unto this Court, without a Rule of this Court to enjoyn them. *Trin.* 24. *Car. B. r. That is, they will not do it upon the requeſt of the party concerned; becauſe by ſuch a requeſt, they cannot be aſcertained whether the Court deſires ſuch a certificat, for the Court ſpeaks only by Rules.*

A *Certiorari* ought to be directed to the *Cuſtos brevium*, and to be returned by him, and is not to be directed to his deputy or returned by him. *Mich.* 24 *Car. B.r. For he is the Officer the Law takes notice of, and not his deputy.*

A *Certiorari* doth not lye to remove a Cauſe after a verdict is given in it. *Mich.* 24 *Car. B. r. For then the Cauſe is determined, and ſo in vain to remove it.*

If a *Certiorari* to certifie a Record, be (by ſome miſhap) ſo torn or defaced, that the Record cannot be perfectly certified by it, the party may have an *alias Certiorari Mich.* 24. *Car. B.r. Upon a motion to the Court, becauſe he had no fruit of the firſt, and ſo it is all one as if he had not any.*

A

A *Certiorari* may be granted to remove an Act of Common Councel of the City of *London*, if the Act be made againſt the Law. 6. *Miii.* 1650. *B.S. For the Common Law is the birthright of the people, and the due proceeding thereof is not to be interrupted by colour of a particular cuſtome or priviledge.*

The Court may grant a new *Certiorari*, to remove a Record before them upon a Writ of Error brought, after that *in nullo eſt erratum* is pleaded; if it be *ad informandam conſcientiam*, in affirmance of the Judgement: but at the prayer of the party that brings the Writ of Error, and after *in nullo eſt erratum* pleaded, they will not do it. *Trin.* 1651. *B.r. For judgments are favoured in Law, and are to be ſupported, as much as juſtice will permit.*

By *Glyn Chief Juſtice Paſc.* 1658. It was ſaid that the Plaintiff in a Writ of Error, may have a new Writ of Error to remove the Record after that the Record is certified, and the Defendant hath pleaded *in nullo eſt erratum*, for it may be the right Record is not removed. *Nota.*

Rolle Chief Juſtice ſaid, *That he did not uſe to grant a* Certiorari *to remove an Endictment, but where the party that prayes it, doth ſhew good cauſe why it ſhould be granted,* viz. *that there cannot be an indifferent tryal had to the County where the Endictment was found. And where he doth grant it, he orders that it ſhall be tryed the next Term following.* 24. *Car. B. r. For Endictments generally concern the Common-Wealth, and therefore delay is not to be admitted in the proſecution of them.*

A *Certiorari* ought not to be granted to remove an Endictment, after the party endicted hath traverſed and pleaded to the Endictment. *By* Rolle.

Mich. 1654. *B. r. For by ſo doing he admits that he is contented it ſhall be tryed where it was preferred.*

A *Certiorari* to remove an Endictment, ought not to be made by any of the Clerks in the Crown Office, without moving the Judges in it, and obtaining a Judges hand to it, and a Warrant from the Maſter of the Crown Office. *For the granting of a* Certiorari *is the Act of the Court, and is to be granted or denied, as they ſhall ſee cauſe, and it is not a matter of courſe to grant it.*

Cuſtomes.

The Cuſtoms of *London* are confirmed by *Magna Charta.* C. 9. viz. *all ſuch as are not repugnant to the Common Law.*

Cuſtoms which are unreaſonable, are not good, nor to be allowed. *Trin.* 22. *Car. B. r. For the Common Law is grounded upon reaſon, and allows not unreaſonable things.*

Any Cuſtom which may be intended to have had a lawful beginning is a good cuſtom. 11. *H.* 7. 14. *Mich.* 24 *Car. B. r. Eſſe not for continuance of time cannot make* malum in ſe *to be good.*

Any thing which may be good and lawful to be done, which had its original from the conſent and agreement made betwixt parties, may be good and warrantable to be done by vertue of a Cuſtom. *Mich.* 23. *Car. B. r. Although ſome particular perſons may be prejudiced thereby; for,* conſenſus tollit errorem.

By the Cuſtom of *London*, an Action upon the Caſe doth lye againſt one for calling a woman Whore, ſo is the common practice now, and ſo it is likewiſe

likewiſe in the Court of the Burrough of *Southwark*, where they alledge a Cuſtom ſpecially for whipping and carting of all Whores, which makes it Actionable: it lyeth likewiſe for a Lodger, for ſhe comes within the Cuſtoms, which reacheth to all the Inhabitants, *quod nota. Hill.* 22. *Car. B. r. But ſhe muſt be Inhabitant of* London. *for by the Law it lies not.*

The Cuſtoms of the Univerſities are confirmed by Act of Parliament. *Paſc.* 23. *Car. B. r.*

The Cuſtomes of *London*, if there be a queſtion in this Court, whether there be ſuch Cuſtoms or not, are to be certified by the mouth of the Recorder. *Paſc.* 24. *Car. B. r. As intended to have conuſance of them, and as being* os Civitatis.

By a Cuſtom which they have in the Town of *South-hampton*, if a baſtard child be found within the Town, and the father of it cannot be diſcovered, he that comes next into the Town, after the Child was found, muſt keep the Child. *Mich.* 24. *Car. B. r. It may be they of the Town did time out of mind agree amongſt themſelves that it ſhould be ſo, and therefore it ſhall not be adjudged to be an unreaſonable Cuſtom, although it ſeems to be a ſtrange Cuſtom.*

By a Cuſtom of the City of *Briſtol*, an Action brought againſt one upon a bare promiſe of the party, that he would pay the money, or upon a *conceſſit ſolvere*, is maintainable there: and ſo it is by the Cuſtom of *London.* 31. *Jan.* 1649. *B. S. This may be thought reaſonable there in regard of ready way uſed in bargaining and commercing one with an another.*

If two perſons be found in arrear upon an Accompt grounded upon the Cuſtom of Merchants, any

any one of them may be charged to pay the whole ſum that both of them were found to be in arrear, upon the accompt: and this is, by the Cuſtome of Merchants. 26. *Jan.* 1650. *B.S.* Viz. *two perſons that drive a joynt trade betwixt them; for it is intended they are each of them anſwerable in way of trade for what his Partner ſhall do.*

If there be a tryal to be had, whether there be ſuch a Cuſtome as is pretended within the City of *London* or not, this iſſue cannot be tryed in the Kings Bench, but it muſt be tryed in *London* in the Huſtings. 27. *Jan.* 1650 *B. S. For this Court cannot ſo well take notice of the Cuſtoms, as they may and ought themſelves.*

By a Cuſtom uſed at Sea, the goods in a ſhip which is taken as prize, ought not to be taken out of the ſhip, before the ſhip ſo taken be condemned for prize in the Court of the Admiralty. *By* Rolle *Chief Juſtice, in the Caſe betwixt* Lever *and* Smith. *Mich.* 1654. *B. S. For before the ſhip be condemned, it appears not judicially that the goods are prize goods, though ſhe be brought in as a prize.*

Compulſion.

None ſhall be compelled by Law, to ſhew or declare any thing, of which by common intendment, he cannot have knowledge. 38. *H.* 6. *f.* 3. *Mich.* 22 *Car. B. r. For the Law will not ſupply foreign intendments, and remote poſſibilities for the benefit of any perſon.*

Counſel

Counſell and Counſellour.

A Counſellour ought not to ſet his hand to a frivolous Plea or Demurrer, to delay a tryal. *Mich.* 22. *Car. B.r. For it is not fair practice, and it doth argue ignorance or foul practice in him that doth it.*

After the Court hath delivered their opinions of the matter in Law depending before them; the Counſel at the barr ought not to urge any thing more for the Clyent in that cauſe. *Mich.* 22. *Car. B.r. For it is uncivil, not to acquieſce in the judgement of the Court, but to ſeem unſatisfied therewith.*

One that is endicted for felony, may have Counſel aſſigned him to ſpeak in matters in Law, which may ariſe upon the Endictment. *Paſc.* 23. *Car. B.r. But not of matters of fact, for of thoſe he ſhall not be preſumed to be ignorant of, though he may be of matters in Law.*

One cannot have Counſel aſſigned by the Court upon an Endictment *in forma pauperis. Paſc.* 23. *Car. Mich.* 1649. *B.r. But Counſel muſt be aſſigned to him by warrant under the hand and ſeal of the Lord Chief Juſtice, that the Counſel may have it in his hand to ſhew to the Court if they require.*

Where Counſell is Aſſigned to one that is Indicted for Felony, the Counſel Aſſigned ought to be entered upon Record. *Paſc.* 24. *Car. B.r. Becauſe it is a publique Act of the Court in relation to the Common-Wealth, as well as to the party.*

County.

County.

Some part of the County of *Cheſter* is not within the County Palatine of *Cheſter*. *Mich.* 22. *Car. B.r.* Q. *what part.*

Where a River doth run betwixt two ſeveral Counties, there one half of the River belongs to one County, and the other half of it belongs to the other County. *Paſc.* 23. *Car. B.r. viz. From the ſhoar to the middeſt of the River, as far as the River extends in length upon the County.* Q. *whether this be generally true without exception.*

Conſtable.

If one that is elected to the Office of a Conſtable, do refuſe to take his Oath to ſerve in that Office, this Court may ſend forth a Writ unto him, to compel him to do it. *Mich.* 22. *Car. B. r. For in all extraordinary caſes which concern the peace and good government of the Nation, this Court is to enforce obedience where ordinary means fail, as being the ſupreme Court.*

If a Court-Leet do not elect a Conſtable where they ought to elect one, or do not give him his Oath to execute his Office as they ought to do, the Quarter Seſſions in the County where the Leet lies may do it. *Mich.* 22. *Car. B.r. For the electing and eſtabliſhing ſuch Officers is for the peace and ſafety of the County where they ought to be elected, which peace and ſafety is chiefly intruſted with the Juſtices of peace there in their Quarter Seſſions.*

A Conſtable that is a Conſtable in one Town, cannot

not execute the Office of a Constable in another Town. *Pasc. 24. Car. B.r. For every Constable hath his particular precinct, through which his authority extends, out of which he is not to act.*

Commission and Commissioners.

Commissions of the Peace, &c. do ceale by the coming of the Kings Bench into that County where they are, if it be proclaimed, else not. *Commis. B. 101. 27. Ass. Pl. 1. 75. N. B. 242.*

The Commissioners of the Statute of Bankrupt have not authority by the Statute of 1. *Jac.* to transfer any other Action to any person in order to the recovery of any of the goods of the Bankrupt, but only such Actions as the Bankrupt himself might have had to recover them, if he had not been found a Bankrupt. *Mich. 22. Car. B. r. For he comes but in the place of the Bankrupt as to the recovery of the Estate.*

The King may by his Commission make one or more Deputy Escheators, to find an Office after the death of a noble man, or for some other special cause. *Pasc. 24. Car. B. r. For such offices are but offices of Enquest, and may be found by special Commissions.*

A Justice of Assize may have a special Commission to ride the Circuit alone, but if his Commission be general and according to the Statute, he is to have an Associat joyned with him in the Commission. *Trin. 24. Car. B. r. For in this case, the King may dispence with the Statute, not being prohibited by the Statute to do it.*

Sessions

Seſſions.

If a Court-Leet do not chooſe a Conſtable, or do not give him his Oath to execute his Office, the quarter Seſſions of the County where the Leet is, may do it. *Mich.* 22. *Car. B. r.* Antea tit. *Conſtable.*

If one ſpeak of a thing to be done at the General Seſſions of the Peace, it ſhall be intended to be meant that it was done at the Quarter Seſſions. *Trin.* 24. *Car. B. r. For that is the moſt General Seſſions, being held for the whole body of the County.*

Commitment.

None ſhall be committed for a contempt done to the Court, if the contempt do not clearly appear to the Court. *Mich.* 22. *Car. B. r. So tender is the Law of inflicting puniſhment upon any without an apparent cauſe.*

Every Commitment to the Goal, ought to be made by Warrant under the hand and ſeal of him that commits the party, and the cauſe why the party is committed ought to be expreſſed in the Warrant. *Paſc.* 23. *Car. B. r. This is true of Commitments made by Juſtices of the Peace in the Country; but this Court may commit by Parol, and without the Cauſe in the Commitment.*

Contempt.

One may be committed for a Contempt done to the Court, but the matter of the Contempt muſt be certain and not doubtful. *Mich.* 22. *Car. B. r.*

For

For elſe the party may perchance be wrongfully Commited, which the Court will be cautious not to do.

An Attatchment lies againſt one for a Contempt done to the Court. *Hill. 22. Car. B. r. To bring him in to anſwer the Contempt, and in ſome caſes the Court will command a Tipſtaff to bring the party in.*

If the Court make a Rule in an Action of Treſpaſs and Ejectment, that the Defendant in the Action ſhall confeſs the Leaſe, Entry, and Ouſter; and yet at the Tryal the Defendant will not do it; the Plaintiff muſt proceed notwithſtanding in his Tryal; but he may alſo proceed in this Court againſt the Defendant upon his Contempt in not obeying the Rule of the Court. *Paſc. 24. Car. B. r. By taking of an Attatchment againſt him for diſobeying the Rule of the Court. 2.*

If one take out an Execution upon a Judgment after that a Writ of Error is brought in this Court to Reverſe the Judgment, and after the Writ of Error is allowed in the Court where the Judgment was given; this is a Contempt to this Court. *Trin. 24. Car. B. r. But it is no Contempt if the Roll be not marked, or notice given to the party of the Writ of Error brought.* Mich. 1649. B. r. *Becauſe he is not bound to take notice of the bringing of the Writ of Error.*

After a Writ of Error ſhewn to the Adverſe Atturney, the Atturney which brings the Writ hath four dayes time to allow, and after he hath allowed, he hath four daies time to put in good Bail.

The Plaintiffs Atturney is not bound to ſearch the Record, whether a Writ of Error be brought or not, but may take out Execution upon the Judgement given for his Clyent, if there be no *Superſedeas* taken

ta ken forth, or have not notice given him of the Writ of Error. *Trin. 24. Car. B. r. For a Writ of Error is an extraordinary thing, and ſeldom brought, and therefore the Atturney is not to take notice of it without notice.*

Condition.

There is difference between a Condition which is annexed to an Eſtate ſubſequent, and a limitation ſubſequent, which is annexed to an Eſtate preſently veſted. *Hill. 22. Car. B. r. The difference is in reſpect of their different operations upon the Eſtate.*

Cauſes.

The Clerk of the Papers is to enter the Cauſes which do depend in Court in his Book in the Office, and out of it he ought to write ſeveral papers, *viz.* one for every Judge in the Court of thoſe cauſes concerning which any thing is to be ſpoken in Court the next day, and to ſend the Papers to the Judges ſeverally at five a Clock in the Evening, before the cauſes are to be ſpoken unto. *Hill. 22. Car. B. r. That the Judges may have time to adviſe of them.*

Confirmation.

A confirmation of Letters Patents, which are void in reſpect that they are againſt the Law, is a void Confirmation, although it be done by Act of Parliament; but if they were not againſt the Law but did only want Law to Authorize them, if they be afterwards Confirmed by Act of Parliament, the Confirmation

mation is good. *Hill.* 22. *Car. B. r. To confirm a thing is to give more ſtrength and power to a thing which hath but a weak and imperfect being, yet hath a being* tiel quel; *but to Confirm a thing which is void or null in it ſelf, is ton Confirm a* non ens, *and can have no operation, and ſuch in accompt of the Law are things acted contrary to Law.*

Chattel.

One may by a conveyance raiſe a Chattel which may be determinable, as well as it may be done by a laſt Will and Teſtament. *Trin.* 23. *Car. B. r. For what may be done by a Will, may be done by a conveyance, which is of a greater force in many caſes than a Will is.*

Copyhold and Copyholder.

A Copyholder doth forfeit his Copyhold by cutting down of the Timber growing upon the Lands belonging to the Copyhold Tenement. *Trin.* 23. *Car. B. r. Except it be for reparations of the Copyhold: and this is for the preſervation of the Copyhold, which elſe might be deſtroyed, and the Lord thereby prejudiced by the Tenant, who is upon the matter but Tenant for life, and by Law is not to do waſt.*

Q. *Whether the King ſhall have a Copyhold, which is granted to one in truſt for an Alien.* Hill. 23. Car. B. r. *It ſeems he ſhall. This was argued about that time, but no judgment given then or ſince to my remembrance.*

It is a forfeiture of the Copyhold, for the Copyholder to refuſe to pay his fine, if it be a fine certain,

or refuſe to appear at his Lords Court, and to do his ſervice there; for there is a Condition in Law implied in every Copyhold Eſtate, that the Copyholder muſt pay his fine and do his ſervice, upon pain of forfeiture for not doing it. *Trin. 24. Car. B. r. But if he refuſe to pay a fine incertain after it is ſet, it is no forfeiture; for the fine may be unreaſonable, and the Court is to adjudge of that.*

A Surrender of a Copyhold to an uſe, makes not one a Copyholder, as to a purchaſe, but as to deſcent it is otherwiſe. 5. *Feb. Hill.* 1649. *B. S. Q.*

If a Copyholder for life cut down Trees, the Lord may carry them away. 6. *Nov.* 1650. *B. S. For when they were ſtanding they were the Lords, and the cutting of them down, gives the Copyholder no intereſt in them,*

A Copyhold eſtate cannot be ſurrendred to another by an Atturney without Deed, but one may be admitted to a Copyhold eſtate by Atturney without a Deed. 2. *Ap.* 1650. *B. S. For there is difference betwixt the paſſing of an eſtate, and the receiving of an eſtate paſſed.*

Contract.

No uſureous Contract can be grounded upon a direct bargain which may either be accepted or refuſed by the party. *Hill* 21. *Car. B. r. For it is not within the Statute, and the party cannot be prejudiced but by his own conſent.*

If a Contract be uſureous, and made ſo that the Statute may be avoided, yet it is a corrupt bargain, and ſhall be adjudged to be within the Statute. *Hill.* 21. *Car. B. r. For it ſhall be within the equitie of*

of it, though it be not within the words; for the Statute being a beneficial Law for the Common-wealth, ſhall be extended to equity, eſpecially where there appears to be ſubtilty uſed to avoid the Statute and the penalty of it.

An abſolute Contract may be diſſolved by Parol if there be good conſideration for the diſſolving of it. *Paſc. 24. Car. B.r. Eſſe not, becauſe it is intended that it was made upon a good conſideration, and therefore it is not reaſonable it ſhould be avoided without a conſideration.*

Every Contract doth imply in it ſelf an Aſſumpſit in Law for to perform the Contract. 4. *Feb. Hill.* 1649. *B. r. For a Contract would be to no purpoſe, if there were not a means to enforce it to be performed.*

If I do promiſe to pay a Debt to *I. S.* which Debt is owing to *I S.* by *G. D.* this is *nudum pactum* for want of a conſideration; and if I do not pay it, yet an Action doth not lie againſt me for not paying it according to my promiſe. 3. *Feb.* 1650. *B. S. But if I promiſe to pay it, if* I.S. *will forbear to ſue* G. D. *for it till ſuch a time, or ſuch other like conſideration, this is a good promiſe; for here is a good conſideration, for this forbearance may be a prejudice to* I. S. *and a benefit to* G.D. *and alſo to him that makes the promiſe.*

Covenant.

If one do Covenant generally to levy a fine of certain Lands, he that doth thus Covenant, is not thereby bound to go before Commiſſioners Authorized by a *dedimus* to take this fine to acknowledge his conſent. *Trin.* 24. *Car. B. r. For it ſhall be in-*

tended he was to do it in the ordinary way, which is not before Commiſſioners.

If a Leſſee for years, Covenant expreſly, to repair a houſe let unto him, and during his term, the houſe is burned down, he is tyed by the Law to repair or new build it, whether it be burnt by negligence or other waies. *Mich.* 1649. *B.S. For by his expreſs Covenant he undertakes to undergo all caſualties, but he is not ſo tyed by a Covenant in Law.*

Conſideration.

One may ſell his Freedom and Priviledge for a conſideration. *Trin.* 24. *Car. B.r. But without a Conſideration he cannot part with it ſo, but that he may recal his grant of it at his pleaſure; for by the Conſideration there is* quid pro quo, *and it is intended he hath a full recompenſe for his freedom, by reaſon of his own Contract.*

If a Deed of Feoffment be made to two or three of Lands or Tenements, and no conſideration is expreſſed in the Deed, for the making of the Deed; it ſhall be intended by the Law, that it was made to them in truſt for the feoffor. *Mich.* 24. *Car. B.r. For it ſhall not be intended, he would part with his Land without a Conſideration, and yet the Deed ſhall be conſtrued to operate ſomething, and alſo that which may ſeem moſt reaſonable.*

If there be a double Conſideration for the grounding of a promiſe, for the breach whereof an Action is brought, though one of the Conſiderations be not good, yet if the other be good, and the promiſe broken, the Action will well lye upon that breach. *Trin.* 51. *B.S. For that one Conſideration is enough to ſupport the promiſe.*

Common

Common and Commoner.

Hoggs are not Commonable Cattel: It ſeems they are not Commonable by reaſon of the deſtruction they make in the Common by rooting, and of their unrulineſs in reſpect of other Beaſts, *Paſc.* 1650. *B. S. Yet by conſent of the Commoners amongſt themſelves, it is uſual to put Hoggs upon Commons and waſtes.*

A Common which is of late times erected, muſt be erected by deed. 3. *Nov.* 1650. *B. S. Becauſe it is a thing againſt the particular intereſt of* meum *and* tuum, *and therefore the Law will ſee it hath a good foundation to warrant it.*

The Lord of the ſoile of the Common, may either ſurcharge or encloſe an overplus of a Common, (that is) ſo much of it as is more than needful for the Commoners to common upon, in regard of the largeneſs of the Common, and the ſmall number of the Commoners and of their ſtock. But if there be not ſuch an overplus of Common, he cannot ſurcharge or encloſe any part of the Common. 18. *Apr.* 1650. *B. S. Nor can he erect a Warrein of Coneys upon the Common; for this would be in prejudice of the Commoners, but where there is an overplus of Common, there the ſurcharging, or encloſure can be no prejudice to them.*

Confeſſion.

If the Plaintiff, in an *Ejectione firme*, will not ſave the Tenant of the Land, againſt whom the Action is brought, harmleſs from all dammages that may befal

him, by reason of the Action brought against him; the Court will suffer the Tenant to Confess the Action: but if he will save him harmless, the Court will not suffer him to do it. 12. *Nov.* 1650. *B. S. For as it's reason that the Tenant should not be prejudiced by the suit which concerns him not; so neither is it reason on the other side, that he should prejudice the Plaintiff, by doing of that which he receives no just benefit by doing it; and by such his doing hinder the bringing of the right of the parties concerned to a legal tryal.*

Copy.

If upon a tryal you will give part of a Copy of an Office in evidence to prove a Deed, which deed is to prove the parties title to the Land in question that gives it in evidence: If that part of the Office given in evidence, be not so much of the Office as doth any way concern the Lands in question, the Court will not admit it to be given in evidence. 28. *Apr.* 1651. *B. S. For though something in the Office may make for him who gives it in evidence, yet it may, if all the Office be taken together make against him, and therefore the Court will have it all given in evidence*, ad informandum conscientiam, *and so satisfie the injury, or else no part of it shall be admitted in evidence.*

The Jury upon a tryal at the Barr, may not be admitted to have any Copies of Deeds or other writings, which were given in evidence unto them, away with them from the Barr to consider of their Verdict, which are not under seal. 28. *Apr.* 1651. *B. S. But all Deeds or writings under seal and given in evidence*

evidence they may have, but nothing which was not given in evidence may they have; for this were to make new evidence which the Court heard not, which ought not to be, for the Court gives their direction to the Jury upon the evidence that is given in Court.

Conveyance.

A Conveyance made unto one by his reputed Name, although he is not the ſame perſon in Law as he is reputed, yet is the Conveyance good: becauſe it appears he was the ſame perſon in fact who was intended to take by the Conveyance; but if ſuch a Conveyance be made to raiſe a uſe, then it is not good. 28. *Apr.* 1651. *B. S. For a Conveyance to raiſe a uſe is uſually made to a ſtranger, and not to* ceſtuy que uſe, *and therefore if it be uncertain, who is the* ceſtuy que uſe, *the Conveyance is void for the incertainty.*

A Conveyance cannot be fraudulent in part of it, and good as to the reſt. 30. *Apr.* 1650. *B. S. For if it be fraudulent and void in part, it is void in all, for it cannot be divided; for it is made and is to take effect,* uno flatu.

If I Covenant to Convey Lands to another, I am bound to do it at my own charges: except it be otherwiſe agreed betwixt us. *Trin.* 1651. *B. S. For he is to perform the whole Covenant at his peril, and the Covenantee is not bound to be aſſiſting unto him in the perfecting thereof.*

Certificate.

This Court will not make a Rule, for a Judge to make a Certificate to them of a matter done before

him; but if the Judge will do it voluntarily they will receive it. *For this Court cannot have conuſance of ſuch private tranſactions of things.*

Clergie.

One Out-lawed for Felony was brought to the barr, and had his Clergy without purgation. *Lib. Int. 120. Mich. 17 H. 7. Ro'. Inter placita Regis.*

Clarke.

By *Rolle* Chief Juſtice, no Clark ought to be admitted into the Office of the *Cuſtos brevium*, without the conſent of the Lord Chief Juſtice firſt obtained: and thoſe that are admitted, ought to be choſen out of the beſt of the Clarks in the Kings Bench Office. 1655. *For the Lord Chief Juſtice hath a ſuperintendent power over all the Offices and Officers belonging to this Court for the better regulation of them in order to the readyer adminiſtration of Juſtice.*

Departure.

WHen the Plaintiff doth Reply in his Replication, a matter which is contrary to that which is admitted in his Declaration, this is a Departure from his Plea. *Mich. 24. Car. B. S. And is as much as to deny what he formerly admitted, which is to ſay and unſay, and is naught for the incertainty, becauſe an iſſue cannot be joyned upon it.*

Deniſon.

An Alien that is made a Deniſon by the Kings Letters Patents, is thereby enabled to purchaſe Lands, but he is not thereby enabled to inherit the Lands of his anceſtors as Heir at Law, but as a Purchaſer he may enjoy Lands of his anceſtors. *Mich. 42. Car. B. S. But if he be Naturalized by Act of Parliament, he may inherit them as Heir at Law, as well as have them by purchaſe; for this doth reſtore him in blood, and makes him as a free-born* Engliſh-*man, and partaker of the Common Lawes of the Land.*

Delivery.

It hath been the courſe to Deliver a Leaſe of Ejectment to the party to whom the Letter of Attorney is delivered, and for the Attorney, by vertue of his Letter of Attorney, to deliver poſſeſſion of the Land let by Leaſe upon his delivery of the Leaſe. *Paſe. 24. Car. B. r. But this courſe is antiquated, except it be in ſome ſpecial Caſes.*

A Deed cannot be Delivered as an eſcrow to the party himſelf to whom the Deed is made. *Trin. 24. Car. B. r. But it muſt be delivered to a ſtranger as an eſcroe, for ſoſoon as it is Delivered to the party to whom it is made, it takes effect as a Deed, and cannot be an eſcroe; but when it is delivered as an eſcroe, it takes no effect till it be Delivered over to the party to whom the Deed is made.*

Dower.

A woman was not Dowable of Tithes, before the Statute of 32. *H.* 8. 24. *Car. B. r. For before that, few Tithes were in Lay-mens hands, or were occupied a lay fee.*

A woman is Dowable of a Common appendant, but not of a Common in groſs *Paſc.* 24. *Car. B. r. For Common appendant belongs to Lands and Tenements whereof ſhe was endowable, and cannot be ſevered.*

A woman may be endowed of the profits of an Office, or of a Fair, or of a Market. *Paſc.* 24. *Car. B. r. Becauſe it is an inheritance, and may be reduced to a certainty* ſub modo.

Dower is favoured in Law, and as it is favoured in it ſelf, ſo is the party that ſues to recover her Dower favoured in her proceedings in Law to recover it, as much as in juſtice may be permitted. *Paſc.* 24. *Car. B. r. For the Common Law doth extraordinarily favour and protect Widows and Orphans, as needing moſt help.*

Difference.

There is a Difference between the Latin words *in dilatè* and *immediatè*, and it is more proper to direct a Writ to be retorned *in dilatè*, than to direct it to be retorned *immediate*. *Hill.* 23. *Car. B. r. For to retorne it* in dilate, *is to retorn with as much ſpeed as may be, and not to uſe any trifling excuſes or delayes to retard the retorn of it: but to retorn it* immediate, *is impoſſible, for it will require ſome conveni-*

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nient time to do it in, and as it may fall out, longer than is expected.

All *Habeas Corpus's* to inferior Courts within 12. miles of *London* are to be returned *immediate.*

Depositions.

Depositions taken in a Cause depending in Chancery, though the cause be there determined or dismissed, may be given in evidence at a tryal at the Barr, in a suit depending here touching the same matter, between the same parties that sued in the Chancery: if the party that deposed to the Interrogatories be dead at the time of the tryal, else not: but those witnesses must appear in person in Court, and be examined *viva voce* in the Cause, and so it is of Depositions taken in any other Court. *Mich.* 24. *Car. B. r. For the fairest way of examination of Witnesses, is the open examination of them in Court, that all parties concerned, may hear them examined, and have liberty to cross-examine them.*

Discretion.

Where a thing is left to any person to be done according to his Discretion, the Law doth intend it must be done with sound Discretion and according to Law; and this Court hath power to redress things that are otherwise done, notwithstanding they be left to the discretion of those that do them. *Trin.* 23. *Car. B. r. For their Discretion is not properly Discretion, but folly or madness that act things contrary to reason, and against Law.*

Devise

Deviſe.

Lee & Rowe Dutton 183

A Deviſe of the profits of Lands for years, is a Deviſe of the Lands themſelves, for ſo many years as the profits are Deviſed. *Trin.* 23. *Car. B. r. For except he have the Lands, he cannot come to take the profits.*

If a man deviſes his Lands to his children without ſayeing more; this is but a Deviſe for life. 36. *Eliz. B.r. In* Dickons *and* Marſhals *Caſe adjudged. Hil.* 23. *Car. B.r. Becauſe there is no eſtate limited, but what the Law doth limit, which cannot be intended greater than for life.*

A Deviſe to one of any thing which the Law would have caſt upon him, although it had not been Deviſed unto him, is a void Deviſe; as a Deviſe to the Deviſees ſon and heir in Fee, is a void Deviſe, for for the Law ſhall adjudge him to be in by deſcent. *Mich.* 24. *Car. B.r. For his title to it by Law, is his ancient and beſt title, and the Law will adjudge him to take by that.*

An Adminiſtrator of a Term cannot Deviſe it, but an Executor of a Term may; for an Executor hath a greater intereſt in his own right, than an Adminiſtrator hath; but an Adminiſtrator of a Term may in his life time ſell it, and the ſale ſhall be good, but Deviſe it he cannot, becauſe the Deviſe doth not take effect till his death, and immediately upon his death, the Law veſts it upon the Adminiſtrator *de bonis non* of the firſt inteſtate. 1651. *B. r. But an executor hath his power from the Teſtator, an Adminiſtrator is impowered by the Ordinary.*

Deodands.

Deodands.

Deodands (that is) the Goods and Chattels, of which *felo de se* (that is) of him that kills himself, do belong to the Kings chief Almoner (that is) he that disposeth of the Kings Alms, to distribute them to the poor, or to employ them in other pious uses, and a discharge given for them to any person that hath such goods of a *felo de se*, in his possession by the Almoner or his deputy, is a good discharge in Law for them; but a discharge given for them by an under-deputy, is no good discharge. *Trin. 23. Car. B. r. For he is no such Officer that the Law takes notice of.*

Any thing which is fixed to the Freehold cannot be forfeited to the Almoner as a *Deodand. Trin. 16. Car. 2. R. in B. R. the King versus* Cros *and* Babin, *per Cur:*

Demurrer.

If a Demurrer be entred, it cannot be waived, except both the Plaintiff and Defendant do consent unto it. *Mich. 22. Car. B. r. Nor then without leave of the Court; because by the Demurrer both parties have submitted the matters in Law in question betwixt them to the judgment of the Court.*

A Demurrer may be upon a replication Rejoynder, &c. as well as upon a Plea. *Mich. 23. Car. B. r. For all parts of a pleading to issue ought to be according to the Rules of Law, and if any part fail, the whole is naught; and may therefore be Demurred unto.* Hob. 306

If the Court do perceive that a Demurrer is put in only to put off a Tryal, or for delaying of the proceedings

ceedings, they will not allow of ſuch a Demurrer nor enjoyn the other party to joyn in the Demurrer, but will give judgment againſt the party upon his frivolous demurrer. *Mich.* 22. *Car. B.* r. And 24. *Car. B.* r. *For though the Court will not hinder the party to take advantage of an ill pleading, by ſuffering him to demurr unto it, that is to demand the judgment of the Court whether he ſhall make any anſwer to it, yet the Court will not favour any party by colour of Demurring to a Plea where there is no probable cauſe to do it, ſo much as to delay the adverſe party thereby.*

Where there ought to be alledged a place from whence the *venue* ſhould come, and it is not alledged but omitted, and yet an iſſue is joyned between the parties; and the *venire* is from the body of the County, the Defendant may Demur upon the *venire facias* (if he will) but if he do not Demur, but ſuffer the tryal to paſs, this is a good tryal. *Mich.* 22. *Car. B.* r. *For he hath ſlipped his advantage of Demurrer: and here is a fair tryal and a Verdict given upon the Oaths of twelve lawful men who heard the evidence, and ſhall be intended to have well underſtood the matter of fact in queſtion betwixt the parties.*

Where a Statute gives leave to plead generally, and the party waives this leave and pleads ſpecially, the other party may Demur upon his ſpecial Plea if he ſee cauſe. *Paſc.* 23. *Car. B.* r. *For though he needed not to have pleaded ſpecially, yet having done it, the Plea muſt be good at his own peril; and the party is not to be barred of taking that advantage of exception to the Plea, which the Law doth give him if it be not a good Plea.*

Age-

A general Demurrer doth not lye to a *Scirefacias. Paſc.* 23. *Car. B. r. For it is in the nature of a judicial Writ; and ſhall therefore be intended to be good, except a particular cauſe of exception to it be alledged.*

Upon a Demurrer to an evidence given to a Jury at a tryal, the Jury are to be diſcharged and not to paſs upon the tryal: But the matter in Law (in queſtion) upon the Demurrer is referred to the Judges to determin. *Paſc.* 13. *Car. B. r.*

A Demurrer to an evidence is, when the party that doth demurr upon it, doth demand the judgment of the Court, whether the matter given in evidence be ſufficient (admitting it to be all true) to finde a verdict for the Plaintiff, upon the iſſue that is joyned betwixt him and the Defendant. *Paſc.* 23. *Car. B. r. And when ſuch a Demurrer is taken, the Plaintiff and the Defendant muſt agree the matter of facti in diſpute betwixt them, otherwiſe the Court cannot proceed to determine the matter in Law: but there muſt be a* Venire de novo *to try it.* Trin. 23. Car. B. r.

The party that is delayed in his proceedings by reaſon of a Demurrer, may move the Court, to appoint a ſhort day after to hear Counſel ſpeak to the Demurrer, and the Court will grant it. *Trin.* 23. *Car. B. r. For the Court* ex Officio *is bound to further the proceedings in Law depending before them as much as conveniently may be.*

In a Demurrer upon an evidence, the party demurred unto, may demand judgment of the Court, whether he ought to joyn in the Demurrer or not. *Trin.* 23. *Car. B. r. For if there be not a colourable matter for to ground the Demurrer upon, the Court will*

will not force the party to joyn in, but will overrule it, that juſtice may not be frivolouſly delayed.

It was ſaid by *Glyn Chief Juſtice*, 1658. Upon a Demurrer in Treſpaſs and Ejectment between *Baſpoole* and *Newton*, that he that Demurs, confeſſeth thereby all the matters in fact alledged by the other party, but he doth not thereby admit of the errors in pleading.

One cannot demurre upon a thing upon what an iſſue cannot be taken, by reaſon of the doubleneſs, and by conſequence, doubtfulneſs of the matter. *Trin. 23. Car. B. r. For a Demurrer muſt be certain, that the Court be not inveigled thereby.*

After the Plaintiff and Defendant have joyned in the iſſue which is to be tryed betwixt them; neither of them can Demurre without the conſent of the other. *Tri. 23. Car. B. r. For by their joyning in the iſſue, both parties have admitted the whole pleading to be good as to try the Iſſue; and therefore it is too late then to demurr.*

There muſt be a ſpecial Demurrer to a negative preignant (that is) a negative Plea, which doth (alſo contain in it an affirmative, and to an argumentative Plea, (that is) a Plea, which concludes nothing directly, but only by way of argument or reaſoning) and to a double Plea, for a general Demurrer, doth admit them to be good. *Mich. 23. Car. B. r. For it doth not ſhew any fault in them as a ſpecial Demurrer doth; and the Court will intend every pleading to be good, till the contrary do appear.*

One may demurr to a Demurrer for the doubleneſs of it; for a Demurrer ought to have formality and certainty in it to avoid barbariſme, an inveigling of the Court; but if one that might Demurr, doth not,

not demurr to it, but joynes in the Demurrer, he cannot demurr afterwards, for he hath ſlipped his advantage. *Mich.* 23. *Car. B.r.*

A Demurrer is double, when that he that doth demurr, doth aſſign, in his Demurrer, (for cauſe of it) one error in fact, and another error in Law, to be in the Plea upon which he demurrs; which he ought not to do in one Demurrer. *Mich.* 23. *Car. B. r. For if either of the cauſes of Demurrer be true, it is enough to overthrow the Plea, and it is at his libr-ty to inſiſt upon that which is beſt for his own advantage; but not upon both, for this were to puzzle the proceedings.*

One may demurr to one part of a Declaration, and yet plead to the other part of it with a *Quoad*, &c. *Mich.* 23. *Car. B. r. For this is but to admit of what is well pleaded, and to deny the reſt.*

Diſcharge.

If an Attatchment be granted by the Court againſt one, and he is thereupon apprehended, he ſhall not be diſcharged upon an *affidavit* made on his behalf: but he that is attatched, muſt appear in perſon in Court, and be there Diſcharged. *Mich.* 22. *Car. B. r. For it is a perſonal offence for which he is attatched, and he ſhall not therefore be diſcharged, except he yield obedience in perſon.*

A paroll agreement before it is broken, may be diſcharged by paroll; but after it is broken, it cannot be diſcharged without ſatisfaction made for the breach of it. *Hill.* 22. *Car. B.r. For by the breach of it, an injury is done to the party which requires ſatisfaction.* Hil. 20. Car. B.r. *And ſuch ſatisfaction cannot be diſcharged by parol.*

If one be arreſted by a *Latitat* out of this Court, and the Plaintiff do not declare againſt him in two Terms after; if the Defendant move the Court that he may be diſcharged, becauſe the Plaintiff doth not proſecute his ſuite againſt him, the Court will Diſcharge him. *Paſc. 23. Car. B.r. For liberty is precious and much favoured in Law, and the Court will intend the Plaintiff hath no cauſe of Action, that is ſo ſlow in the proſecution of it.*

It is now a controverted point, that if the Priſon-keeper ſuffers a priſoner to eſcape, and afterwards a *Scire facias* ſued out againſt the Defendant, and two Nichils returned, and he taken again, whether it is lawful or no, the Court was divided in opinion. *Paſc. 21. Car. 2. Reg. in Com. Ban.*

If the Plaintiff, at whoſe ſuit the Defendant is in execution, do give the Defendant leave to go at larg (that is) out of priſon, the execution is thereby diſcharged: and if the Plaintiff do take the Defendant again upon the ſame execution, and commit him to priſon, the Defendant may bring an *Audita querela* againſt the Plaintiff, for his illegal impriſoning of him. *Mich. 23. Car. B.r. For it ſhall be intended, that the Plaintiff had ſatisfaction upon the execution, or elſe he would not have given the Defendant leave to go at large; and therefore if he take him again upon the ſame execution, the Law will adjudge it an unjuſt vexation, for which an* Audita querela *doth lie.*

A Priſoner that is committed for Felony, and brought to this Barr by a *Habeas Corpus*, cannot be diſcharged, although the retorn upon the *Habeas Corpus* be not ſufficient to give the Court ſatisfaction that he was juſtly committed. *Paſc. 24. Car. B.r. For the Court is alwaies cautious how they give liberty*

liberty to Capital offenders, becauſe the puniſhing of ſuch offences concerns much the good of the Kingdom in its peace and ſafety.

A Priſoner that is brought to the Barr, to be bailed by a Writ of *Habeas Corpus*, if he were committed for matter on the Crown ſide, he muſt be brought into Court on the Crown ſide, (that is) on that ſide of the Court where the Maſter of the Crown-Office ſits; but if he ſtands committed for a matter determinable on the Pleas ſide, he muſt be brought into Court, to be bailed on that ſide of the Court where the Maſter of the Kings-Bench Office ſits, *viz.* on the left hand of the Lord Chief Juſtice. *Paſc.* 24. *Car. B. r. For the Kings Bench Court is a Court which holds Plea in a double capacity, viz. in Criminal matters which concern the Publick, and in Civil matters ariſing betwixt ſubject and ſubject; and in thoſe reſpects it hath ſeveral Offices and Officers appropriated to the tranſaction and diſpatch of maters Criminal and Civil; and thoſe Officers have their conſtant and known Offices and places in Court to ſit for diſpatch of ſuch matters.*

Of later time it hath been permitted by the Court to Diſcharge the Bail, if he bring in the principal before the retorn of the ſecond *Scire facias* iſſued out againſt the Bail, but anciently it was not ſo. *Mich.* 24. *Car. B. r. This is in favour of the bail, whom I conceive the Law doth therefore favour, becauſe it judgeth it hard for one man to pay another mans debt, which he intended not to do, though he became bail for him.*

A Judgment cannot be Diſcharged by pleading a Parol agreement between the parties to Diſcharge it. 27. *Jan.* 1650. *B. S. For, matters of record are not to be wiped off with words; for records are things made*

upon ſolemn deliberation, and are of a high nature, and great regard in Law.

Diſſeiſor.

If one enter wrongfully into my Lands, and after his entry I accept rent of him for the Land, I cannot afterwards take him for a Diſſeiſor. *Trin.* 24. *Car. B. r. For by my acceptance of the rent I have aſſented to his entry, and purged the wrong by admitting him for my Tenant.*

Diſtreſs and Diſtringas.

The ſeiſing of a ſtray is not a Diſtreſs of it, for he that doth ſeiſe it claims a property in it, *viz.* a conditional property, that is, if it be not owned within a year and a day. 21. *Car. B. r. And no man can claim that in which he claimes any property; for to Diſtrain, is but to take one thing from another, and to put it into the cuſtody of the Law, as a pledge for another thing which is due to him that doth Diſtrain, from him that is Diſtrained.*

An amercement lies not againſt a Sheriff out of his Office, for a miſdemeanour done by him, whilſt he was in his Office; but a *Diſtringas nuper Vicecomiti*, lies againſt him for it. *Paſc.* 24. *Car. B. r. For an amercement lyes properly againſt an Officer of the Court for ſome miſdemeanour, and is not a proceſs of the Court as a* Diſtringas *is, which may iſſue forth againſt one that is a ſtranger.*

The Writ of *Venire facias*, for the Sheriff to ſummon a Jury, is retornable by him into the Court: and

and upon the retorn made of it to him, there iſſues out of the Court another Writ called a *Diſtringas Juratores*, to cauſe the Jury to appear in Court at the tryal of the Cauſe, if the tryal be at the Barr in this Court, or at the Aſſiſes in the County where the Action lies, if the tryal be to be there. *Mich.* 24. *Car. B. r. The* Venire *is in the nature of a ſummons, but a* Diſtringas *is a proceſs of a higher nature to make them appear upon a penalty.*

The Writ of *Diſtringas Juratores* ought to be delivered unto the Sheriff ſo timely, that he may warn the Jury to appear four daies before the Writ is retornable, if the Jurors live within fourty miles of the place of tryal, and eight daies if they live further off. 13. *Maii.* 1651. *B. S. That they may have time to ſettle their own buſineſſes, and prepare for their travelling.*

Diſcontinuance.

A proceſs is ſaid to be Diſcontinued, when it appears by the Record that there was ſome time whereby ſome defect or other in the Record, the Court took no notice of the Cauſe depending, nor took care to continue the proceeding therein, in order to the determination thereof, but the parties were *ſine die* in Court.

A Diſcontinuance in proceſs is helped, if there follow a Verdict in the cauſe, and the party do alſo appear upon the Verdict. 21. *Car. B. r. For by the verdict and appearance thereupon, it is admitted that the proceſs hath been duly proceeded in.* Q. *Whether every Diſcontinuance of proceſs may be thus helped.*

Where a Vouchee may be essoigned, and the essoigne is not adjourned, this is a Discontinuance: but where it is not necessary the vouchee should be essoigned, there the want of adjournment of the essoigne, makes no Discontinuance. *Hill.* 22. *Car. B.r. Because where an essoignment is necessary, there it is accompted part of the process, and the not adjournment of it must be a Discontinuance of the process; but where it is not necessary, there it is accompted as no part of the process, and for its not being adjourned doth not Discontinue the process.*

An appeal may as well be Discontinued by the defect of the process or proceeding in it, as it may be by insufficiency of the Original Writ. *Hill.* 22. *Car. B.r. For by such defect in the proceeding, the matter depending in Court is as it were out of Court, and made not depending, although the Court was sufficiently at first possessed of the cause by the sufficiency of the Original Writ: But if the Original Writ be not good, the Court is not rightly possessed of the cause, and then all proceedings upon it are null, and are to be discontinued.*

The Plaintiff cannot Discontinue his Action after a Demurrer joyned and entred, or after a generall or speciall Verdict found, or after a Writ of Enquiry executed without leave of the Court, Per Magistrum Livesay, & alios, &c. Pasc. 21. Car. 2. Reg.

The Plaintiff may Discontinue his Action by the leave of the Court, after he hath joyned in Demurrer with the Defendant; paying Costs to the Defendant, if the demurrer was only upon matter of form

in

in the pleading: But if the demurrer was as well upon matter of ſubſtance as upon matter of form, there he cannot diſcontinue his Action by leave of the Court, *Mich.* 24. *Car. B.r. Except the Defendant will conſent unto it; for there is great difference betwixt a demurrer joyned upon a matter only of form, and a demurrer joyned upon matter of Law and ſubſtance, and the parties nor the Court can alter the Law, though the parties will conſent.*

A Diſcontinuance of an Action or Suit, is not a perfect diſcontinuance, until it be entred upon the Roll: for the entry of it makes it part of the Record, and a Record cannot be Diſcontinued, but by matter of Record; but if this Diſcontinuance be to be pleaded, it is not neceſſary to plead the entry of it. *Tr.* 23. *Car. B. r. For it ſhall be intended that it is entred without ſhewing it.*

In the Caſe of *Robinſon* and *Vanbragg*, *Mich.* 1650. After a demurrer joyned, and ſpoken unto by Counſel on both ſides, it was moved that the Plaintiff might Diſcontinue his Action. *Glyn* Chief Juſtice anſwered that this motion hath been ſometimes granted, and ſometimes denied; and that the Common Pleas denied this motion in the Caſe of *Butler* and *Baker*.

Where a demurrer is a general demurrer, whereas it ought to have been a ſpecial demurrer; this is a Diſcontinuance, and there can be no judgment given in the Caſe upon ſuch a demurrer. *Hill.* 23. *Car. B.r. Becauſe by the Diſcontinuance the cauſe is out of Court.*

After a demurrer upon an arbitration pleaded, it is not uſual to diſcontinue the Action. *Mich.* 24. *Car. B. r. But to argue the demurrer to trie the va-*

validity of the arbitration ſo pleaded to avoid delay.

Demand.

Where there is a Demand of a thing to be made, there the Demand muſt be a Legal Demand, (that is) it muſt be made in ſuch manner as the Law requires; otherwiſe he that made the Demand, can take no advantage in Law upon this Demand. *Hill.* 21. *Car. B. r. That is where the Law doth direct a Demand to be made by one perſon unto another; for the not doing whereof, he that demands the thing to be done, may by Law take an advantage againſt the other perſon for the not doing thereof, there it muſt be a Legal Demand.*

If there be no place expreſſed in a Deed, where a rent for Land, or a *nomine pœnæ*, or any other thing demandable ſhall be made, the Law doth then direct, that the Demand ſhall be made upon the Land, &c. out of which the rent, or *nomine pœnæ*, or other thing demandable do iſſue or go out of. *Hill.* 21. *Car. B. r. For that is the moſt proper place to make ſuch a Demand, becauſe the rent and* nomine pœnæ *partake of the nature of the Land, out of which they iſſue, yet the parties by their agreement may direct the Demand to be made elſewhere; for* modus & conventio vincunt Legem.

A Demand of a rent reſerved upon a Leaſe made of a Meſſuage with Lands belonging to it, ought to be made at the Meſſuage; becauſe the Meſſuage is the moſt eminent part and place of the thing let, and moſt notorious for the Leſſee to take the beſt notice of the Demand. 21. *Car. B. r. For the Leſſee ſhall be*

preſumed

presumed to be more conversant there than in any other place. Yet if the Demand were made upon any part of the Land, and the Lessor can prove that the Lessee was there and took notice of it, I suppose it is a good Demand: but if he be not there when the Demand was, made Q. then it's no good Demand.

The parties bringing of an Action of Debt for monies due upon an Obligation, and the taking of a distress for rent by him unto whom the rent is due, is a good Demand in Law of the Debt due by the Obligation, and of the rent. *Trin. 22. Car. B. r. For in the one case the money is demanded in Writ, and in the other the taking of the distress is a real, though a silent Demand of the duty due, for the which the distress is taken.*

A Demand in a *precipe* to recover Lands, ought to be more certain than a Demand in a Writ of Dowr. 18. *Nov.* 1650. *B. S. For Dower is one of the things favoured in Law, and the Demand in Dower is supposed to be made by a woman, who is not presumed to be conusant of the* Punctilio's *of the Law.*

Declaration.

A Plaintiff after Plea pleaded, or before, after the second Term shall not add a new count to his Declaration, as in Indebitatus assumpsit, or the like, upon pretence of mending his Declaration. Per Magistrum Livesay, & alios &c. Pasc. 21. Car. 2di. Reg.

A Declaration may be against one that is in custody of the Marshal of this Court upon an information, although

although he do not appear to an Action. *Hill* 21. *Car. B. r. For his appearance is not necessary, because, being in custody, it is as much as if he had appeared and given bail to the Action, or else committed for not giving of bail.*

The Plaintiff is not compellable to his Declaration; yet if it be not filed, and afterwards judgment is given in the Cause for the Plaintiff upon demurrer, upon default, or confession, the judgment is erroneous for want of a Declaration. *Hill* 21. *Car. B. r. For before it is filed it is not upon record, and so there is no Declaration to warrant the judgment. He is not compellable, because the Law presumes he will do it because of the prejudice may befal him by the not doing of it, and the Law will not do needless things.*

If the Plaintiffs Attorney do file a Declaration against the Defendant in the Kings Bench Office, the Defendant is bound to take notice of the Declaration at his peril. 21. *Car. B. r. And it is not necessary for him to give a Copy of the Declaration to the Defendants Attorney; for he may take one out of the Office, yet it is usual to give a Copy, and it is accounted to be fair practice to do it: and by some Attorneys I have heard it affirmed that it is necessary, and ought to be done, otherwise it is irregular practice.*

If an Information be upon a corrupt Contract made against the Statute of 21. *Jac.* made against Usury, he must express in the Information, that the Defendant *corrupte agreavit*, or else he must shew, that the Contract was made *pro usura*, contrary to the Statute. 21. *Car. B. r. For he must pursue the words of the Statute, and those words are the very foundation upon which the Statute doth enable the Plaintiff to bring his Action.*

One

One may not Declare againſt one that is not either in *cuſtodia Mareſchalli*, or that hath not filed his bail, or that it not a priviledged perſon in this Court. 21. *Car. B. r. For no other waies can any one be ſaid to be preſent in Court, and ſo the Court hath no conuſance of the matter. For if the Defendant be in a County Gaol, or other Priſon, the Plaintiff before he can Declare againſt him, muſt bring him up, and turn him over by* Habeas Corpus.

Where and how a Declaration may be amended, and where not, *vid. Amendment.*

If one be in cuſtody of the Mareſcal of this Court at the ſuit of *I. S.* or have put in common bail in this Court to the Action of *I. S.* any other perſon may put in a Declaration againſt him, the ſame Term he was committed, in cuſtody, or did put in Bail as aforeſaid. 21. *Car. B. r. For his being in cuſtody, or his putting in Bail do ſuppoſe him alwaies preſent in Court to anſwer any perſon, ſo that it is needleſs to take out any further proceſs to bring him in to anſwer, but upon ſuch a Declaration given unto him he muſt plead at his peril.*

If the Plaintiffs Atturney, deliver a Declaration to the Defendants Atturney, and after doth amend his Declaration, and tenders another Copy to the Defendants Atturney, *viz.* as he hath amended it; the Defendants Atturney is not bound to receive it, except the Maſter of the Office do order him to receive it, or that the matter be moved in Court, and thereupon the Court do order him to receive it. *Mich. 22. Car. B. r. For it may be in the ſubſtance of a new Declaration, and may require a different Plea, which the maſter of the Office, or the Court muſt judge of, and not the Atturneys.*

The

The Plaintiff may amend his Declaration in matter of form, after a general iſſue pleaded before Entry, without paying coſts, or giving imparlance, but if he mend in ſubſtance, to pay coſts or give imparlance at his election: but if he amend in ſubſtance after a ſpecial Plea pleaded, to pay coſts though he would give imparlance. Per Magiſtrum Liveſay, & alios, Paſc. 21. Car. 2di. Reg.

The Plaintiff in this Court is not bound by the Law to Declare againſt the Defendant, within three Terms next after his appearance upon a *Habeas Corpus* in Court to the Plaintiffs Action; But the Court upon the Defendants motion doth uſually make the Plaintiff declare his cauſe of Action before that, if there be not cauſe to give ſpecial bail, that then the Plaintiff may be enforced to let the Defendant go at large upon common bail; but if he do not declare againſt him in three Terms next after, the Plaintiff muſt then take common bail of him. *Mich.* 22. *Car. B. r.* and *Mich.* 1650. *B. S. For it ſhall be preſumed, if there had been cauſe for ſpecial bail, the Plaintiff would not have been ſo dilatory in his proceedings, and beſides the Defendants impriſonment is made longer by the Plaintiffs delay, and is conſiderable.*

A Declaration muſt be certain, and the Court is not to take things in it by implication; and alſo if it be not certain, the Defendant cannot make a direct anſwer unto it. *Mich* 22. *Car. B. r.* and *Paſc.* 24. *Car. B. r. As he ought to do: for the Law loves plain dealing, and allows not of ſubtil and catching pleadings.*

The

The Plaintiff is to enter his Declaration in the Office, and all Copies which are made of it, and the record it ſelf of the Cauſe, ought to be directed and warranted by it. 22. *Car. B. r. For the entring of it there, puts it into ſafe hands, and makes it authentical, and it is the groundwork of the Cauſe depending.*

If an Action upon the Caſe be brought upon an Aſſumpſit, the Plaintiff muſt declare upon the whole promiſe made, and not upon part of it, elſe the Plaintiff upon the tryal will be Non-ſuit. *Mich.* 22. *Car. B. r. For the omitting of any part of the promiſe may alter the promiſe, and make the Caſe different for the truth and reality of it, as it would have bin if the whole promiſe had been truly ſet forth.*

Where the Plaintiff doth declare as Executor, or as Adminiſtrator, he ought to ſet forth the Probate of the Will, and the Letters of Adminiſtration granted unto him, in his Declaration, otherwiſe the Declaration is not good, but the Defendant may demurr upon it. *Mich.* 22. *Car. B. r. For without ſhewing them, they do not entitle themſelves to the Action brought, nor make themſelves perſons enabled by Law to bring the Action; for it doth not appear to the Court that there was ſuch a Will made, or that there were ſuch Letters of Adminiſtration granted, or that the Plaintiffs are Executors, or Adminiſtrators under which title they ſue.*

If a Declaration be defective in matter of form only, and the Defendant doth take no exception againſt it, but pleads to iſſue, and a verdict is thereupon found for the Plaintiff, the Defendant cannot afterwards take advantage of this defect in the Declaration, for the defect is helped by the verdict: but if the Declaration be inſufficient in matter of ſub-

ſtance

ſtance, the verdict will not help it, but the Plaintiff may take the advantage of the inſufficiency of it after a verdict. *Mich. 23. Car. B. r. For where it is defective in ſubſtance, there can be no good judgment given, notwithſtanding the Verdict which only finds matters of fact, and leaves the Law to the Court.*

All matters which do lye in the cogniſance of the Court ought to be ſet forth certainly in a Declaration; for the Court is to give judgment upon the pleading, as it ſtands plain and clear before them; but it is not neceſſary to ſet forth certainly matters of fact which are tryable by the Jury. *Hill. 22. Car. B. r.*

If the Plaintiffs Attorney cannot find the Defendants Attorney to deliver a Declaration unto him, he may file the Declaration in the Office, and that ſhall be accounted a good delivery of it; ſo that if the Defendant do not plead according to the Rules of the Court, judgment may be entred againſt him. *Paſc. 13. Car. B. r. For it is intended, that Attorneys ought to attend in the Office, and there to inform themſelves in the proceedings of their Clyents Cauſes. Q. Whether if he can find him, whether he muſt deliver the Declaration unto him; for the Court held he need not, but* Hodſden *the Secondary held the contrary, and it is the common practice to deliver a Copy of the Declaration to the Defendants Attorney.*

A thing that is good and warrantable to be put in a Writ, is good and warrantable in a Declaration. *Trin. 23. B. r. For the Declaration is grounded upon, and warranted by the Writ, and the Declaration doth but ſet forth at large what is ſummarily expreſſed in the Writ.*

If there be words in a Declaration which have no ſignifica-

ſignification, the words ſhall be adjudged to be void words, and ſhall not hurt the Declaration, but the Declaration ſhall be taken, as if thoſe words were left out of the Declaration. *Hill.* 23. *Car. B. r. Paſc.* 24. *Car. B. r. If there be other words ſufficient in the Declaration to make it a good Declaration.*

A Declaration in Engliſh is not good, for all pleadings in Law ought by the Statute to be in Latin. *Paſc.* 24. *Car. B. r.*

An *Auditæ querelæ*, and a *Scire facias*, are in the nature of a Declaration. *Paſc.* 24. *Car. B. r. For they do ſet forth at large the cauſe of the Plaintiffs Action, as a Declaration doth.* a.d. 25

Declarations which are grounded upon original Writs, as all Declarations in the Court of Common Pleas are: if they be faulty, they cannot be amended, but Declarations grounded upon a Bill, as the Declarations in the Court of the Kings Bench are, are amendable if they be faulty. *Paſc.* 24. *Car. B. r. For Declarations grounded upon Originals muſt agree with the Originals; and if they be faulty, it is intended that the Original upon which the Declaration is grounded is alſo faulty, and ſo the Plaintiff muſt purchaſe a new Original; but a Declaration in the Kings Bench is not grounded upon the* Latitat *or Bill of* Middleſex, *but the Plaintiff declares at large, and as his Caſe requireth; for the* Latitat *or Bill of* Middleſex *do not ſet forth the cauſe of Action as Originals do, but run generally for a Defendant to anſwer to a Treſpaſs; but where ſpecial bail is required, the old courſe of the Court is altered by a ſhort expreſſing of the cauſe of Action in the Bill of* Middleſex *or* Latitat, *ſince the Statute of* 62.

If a Declaration be drawn in the Term, but is not delivered to the Defendants Attorney that

Term,

Term, but is delivered unto him before the firſt Eſſoine day, of the next Term after, this ſhall be accounted for a Declaration of that Term when it was drawn, and not of that Term when it was delivered. The Eſſoine day is ſometimes one day, ſometimes two daies before the Retorn of the Writ, at which day, the party may come in, and make his excuſe why he cannot appear preciſely upon that day, if he have any Legal excuſe to make, and this is called an Eſſoin. *Trin.* 24. *Car. B. r. For before the Eſſoine day, the Term as to ſuch purpoſes, is not ſaid to be begun, for before that day, it cannot be known whether the Defendant will appear preciſely at the day of the Retorn of the Writ, or be Eſſoined.*

A Declaration may be filed in the Office, many years after it was firſt drawn: if it appear that it was only the Attorneys neglect that it was not filed as it ought to have been. 24. *Car. B. r.* 19. *Apr.* 1648. *B. r. For the filing of it is not of the eſſence of the Declaration; for it is a good Declaration to proceed upon without the filing of it, and the filing of it is but to prevent foul practice, and to keep it upon Record to warrant the proceedings.*

If bail be filed for the Defendant, the Plaintiff may declare againſt him, in any other matter beſides the matter that is contained in the Writ brought by the Plaintiff againſt the Defendant. *Mich.* 24. *Car. B. r. Becauſe the Writ runs generally only to anſwer the Plaintiff in a Plea of Treſpaſs, where ſpecial bail is not required, and doth not ſet forth the nature of the Action.*

A Declaration delivered with Imparlance, or *Li. la.* is in the language and meaning of Attorneys, ſuch a Declaration that is delivered, with leave for the Defen-

Defendant to emparle until the next Term. *Hill.* 1649. 12. *Feb. B. S. The words by Li, lo, do mean* Licentia interloquendi, *which is as much as to have licence, or leave to emparle, or to adviſe and ſpeak with his Clyent to know what he ſhould plead for him.*

When one is arreſted by a *Latitat*, or Bill of *Middleſex* out of this Court, he is not ſaid to be in cuſtody of the Marſhal, until he hath put in bail to the Plaintiffs Action, and the bail be filed; or elſe be taken by the Writ, and committed to the Mareſchal for want of bail: and if from that time, the Plaintiff do not declare againſt the Defendant in three whole Terms after, which he cannot be compelled to do, then he muſt accept of common bail, and diſcharge the former bail. *Trin.* 1650. *B. S: For the Court will preſume his cauſe of Action is but ſmall, and requires not ſpecial Bail, becauſe he is ſo ſlack in his proceeding.*

By *Glyn* Chief Juſtice. *Trin.* 1658. If one do declare upon an Obligation with a *hic in Curia prolat'* and do not ſhew the Obligation, this is not a good Declaration, and therefore after three Terms, the Defendant if he be in *Cuſtodia* may go at large upon Common bail; but the Defendant muſt pray Oyer of it, elſe the Plaintiff is not bound to ſhew it.

The Plaintiffs Attorney is not bound to give a Copy of the Declaration againſt the Defendant, to the Defendants Atturney. 13. *Novem.* 1650. *B. S. For the Defendants Atturney may take a Copy of it out of the Office, where the Declaration is filed, yet they uſually do it, and it is accounted fair practice to do it.*

By *Glyn* Chief Juſtice, *Mich.* 1658. Upon a motion in arreſt of judgment, a Declaration in a meer Action of Treſpaſs, *quare vi & armis* is not good with a *quod cum, &c.* becauſe there is no abſolute affirming of the Treſpaſs but only by inference: but an Action upon the Caſe is good enough; the reaſon is, becauſe in a Treſpaſs *vi & armis*, a fine is to be paid to the King by the party for breach of the peace, and therefore the treſpaſs muſt be poſitively averred, but in the latter caſe, dammages are only to be recovered, and the Defendant amerced.

It is not neceſſary for the Plaintiffs Atturney, to ſet his hand unto the Declaration, which he delivers to the Defendants Attorney: but the Defendants Attorney muſt receive it without his hand ſet to it: If he know him to be the Atturney in the Cauſe. 28. *Nov.* 1650. *B. S. But if he doubt whether he be or no, it is otherwiſe.*

If one be in cuſtody of the Marſhal of this Court, any perſon may put in a Declaration againſt him, and the Declaration ſo put in is a good Declaration, and the party muſt plead unto it, although he be illegally in cuſtody, for the Court will not trouble themſelves to enquire how the party came into Priſon. *Paſc.* 1652. *B. S. And being in cuſtody he is bound to anſwer every ones ſuit.*

If a Priſoner be brought into the Court of the Kings Bench by a Writ of *Habeas Corpus* to anſwer a Suite there depending againſt him, a ſtranger cannot declare againſt him there upon the by, until he be in cuſtody of the Marſhal: but he that brought the Priſoner thither, by the *Habeas Corpus* may declare againſt the Priſoner in Court, before he is turned over in cuſtody to the Marſhal. *Paſc.* 1652. *B. S.*

For

For the very Writ of Habeas Corpus, *was to bring him into Court to anſwer to the party; but a ſtranger to the Writ, cannot take notice of his being in Court, but he may take notice when he is cuſtody, though it be at the ſuit of another, and needs not to take out proceſs againſt him, for that is needleſs.*

In the Caſe of *Milner* againſt *Tems* Sheriff of *London*, *Paſc.* 1657. It was ſaid by the Court, That if one give bond to the Sheriff to appear at a day upon one cauſe of Action, and doth not appear, the party that brought the Action cannot ſue the Sheriffs bond, and Declare againſt the party upon another cauſe of Action; but he may force him to appear at the day according to the bond, without declaring againſt him; for before his appearance he is not bound to declare his cauſe of Action.

In the Caſe of *Cutler* and *Cutler*, *Mich.* 1658. It was held by the Court, That where one may Declare by the Common Law, there he ſhall not declare upon a ſpecial Cuſtom; becauſe the Common Law is to be preferred, and therefore, if the Plaintiff do Declare otherwiſe, the Declaration is not good, if the Defendant will demurr to it; but if he waive his advantage, and plead to iſſue, and a verdict is found for the Plaintiff, he ſhall not move this matter in Arreſt of judgment.

One ought not to declare againſt the Defendant in this Court, until his Bail be filed; for before he is not *in cuſtodia*, as he is by his bail when bail is put in. By *Rolle* Chief Juſtice. *Paſc.* 1652. *B. S. That is, if he do put in Bail; but if not, but is turned over to the Mareſchal, he may Declare againſt him* in cuſtodia.

Duty.

The words *foris faceret* may create a Duty. *Hill.* 21. *Car. B. r. For the party to whom a thing is forfeited, hath an intereſt in the thing forfeited, before he recovers it.*

Any thing that is known to be due by Law, and thereby recoverable, is a Duty before it is recovered, becauſe the party to whom it is due hath a power to recover it, from him from whom it is due.

Dammages.

Dammages ought not to be given for that which is not (at all) contained in the Plaintiffs Declaration: or for that which is immaterially alledged, or againſt Law: but only for that which is materially alledged, and ſet forth in the Declaration. *Hill.* 21. *Car. B. r.* 23. *Car. B. r. For the Law will not repair any one for ſuch Dammages due to him, as he complains not for, and in ſuch manner as the Law directs; for the Law doth not only ſhew every one what is his right, but doth alſo point out the way how to recover ones right if it be detained.*

Where an Action upon the Caſe, and an Action of treſpaſs, are both founded upon one and the ſame Dammage done to the Plaintiff, he may recover Dammages upon both the Actions. *Hill.* 21. *Car. B. r. Becauſe the Actions do not Differ in their natures.*

Where a treſpaſs for which an Action is brought, is entire, and not ſeveral treſpaſſes, there ought not to be ſeveral Dammages given againſt the Defendant. *Mich.* 21. *Car. B. r. For the Treſpaſs being*

him

but one, the Dammages growing thereupon ſhall not be ſaid to be ſeveral Dammages, and ſo ought not to be divided.

Where one joynt Action of treſpaſs is brought for two ſeveral treſpaſſes, and the treſpaſſes are found ſeverally, the Dammages may be ſeveral; for the Dammages are to be according to the finding of the Jury: but if one Action of Treſpaſs be brought againſt three Treſpaſſers, and two of the Treſpaſſers againſt whom the Action is brought be found guilty, and the third is found not guilty, there the Dammage may notwithſtanding be entire. *Mich. 22. Car. B. r. For the treſpaſs is but one joynt treſpaſs, though the Action be brought againſt divers perſons: But in the former Caſe, there are ſeveral treſpaſſes found, and ſo the Dammages may be ſeveral, though the Action be a joynt Action.*

In an Action upon the Caſe, the Jury may find leſs Dammages, than the Plaintiff layes in his Declaration: but they cannot find more than is laid in the Declaration; if they do, it is error. *Mich. 22. Car. B. r. For the Law preſumes, that the Plaintiff doth beſt know how much he is damnified by the Defendant: and therefore, though it may be, the Plaintiff will pretend he is more damnified then in truth he is; (as is often done) yet it ſhall not be preſumed that the Plaintiff will ſay he is leſs Damnified by the Defendant, than in truth he is. And therefore for the Jury to give more Dammages than the Plaintiff declares upon, would be unreaſonable, which the Law will not ſuffer.*

Double Dammages given for one and the ſame Treſpaſs, are not well given. *Mich. 22. Car. B.r. For the Law uſes to proportion the amends or ſatisfaction for*

an injury done, according to the loſs which the party to whom the injury is done, doth receive by the injury, and the Jury ought to alter the Law by their verdict.

Upon a judgment given upon a demurrer, upon an Action of the Caſe, the Court is not to aſſeſs the dammages, but the Jury is to do it. *Mich.* 22. *Car. B.r. For the Court gives the judgment upon the matter in Law, but the Dammages are to be given upon conſideration of the matter of fact, which is proper only for the Jury to enquire of, and is left to them to aſſeſs, as the Law is determined.*

In an Aſſize the Jury ought to give Dammages pending the Suit, becauſe there is no remedy over to recover the Dammages, (becauſe there the Land it ſelf is recovered) but in an *Ejectione firmæ*, the poſſeſſion is only recovered; but ſmall Dammages are to be given. *Paſc.* 23. *Car. B.r.*

Upon a demurrer to an evidence, the Court did direct the Jury, who ſhould have tryed the iſſue, if the demurrer had not been, to find Dammages for the Plaintiff, if upon arguing the demurrer the Court ſhould give judgment for him. *Paſc* 23. *Car. B.r. For the Jury may conſider of the matter in fact, which ſhould have been tryed, if the evidence had not been demurred unto, notwithſtanding the demurrer, which only concerns the matter in Law, and may find Dammages accordingly.*

Where Dammages are found ſeverally, the Plaintiff may relinquiſh part of the Dammages, and enter his judgement for the reſt. *Hill.* 23. *Car. B.r. But where the Dammages are entire, he may do it without leave of the Court.* Paſc. 24. Car. B.r. & 19. Ap. 1648. *Becauſe they cannot be ſo indifferently proportioned.*

The

The Jury ought to find Dammages in a ſpecial verdict found in an Action of Treſpaſs and Ejectment: for until the Plaintiffs Title is found, which is not done by the ſpecial verdict, the Plaintiff ſhall be accounted a Treſpaſſer againſt the Defendant; becauſe the Defendant was in poſſeſſion of the Land, when the Plaintiff entred and made the Leaſe of the Land. *Paſc. 24. Car. B. r. For he that is in poſſeſſion of Land, hath, in preſumption of Law, title to it againſt all the world, until a better title is proved.* Melior eſt conditio poſſidentis, quam petentis.

A debt ſued for, doth appear certainly to the Court what it is, and if the Plaintiff recover, the Court doth tax the Dammages, and not the Jury, becauſe it is apparent, and there needs no enquiry what it is. But in Actions upon the Caſe, where Dammages are uncertain, there it is left to the Jury to enquire of and to tax them. *Trin. 24. Car. B. r.*

A Writ of Enquiry of Dammages in a Cauſe tryed in the Marſhals Court, may be executed by the Judges in the Court there. *Trin. 24. Car. B. r. By reaſon of the ſpecial priviledge of that Court, within its own juriſdiction, and for the more quick diſpatch of Juſtice.*

Greater Coſts may be given in ſome Caſes, than the Dammages laid in the Declaration. *Trin. 24. Car. B. r. For the Plaintiffs Declaration is only for the Dammages due unto him, by reaſon of the injury done him by the Defendant. But the Coſts are given in reſpect of the Plaintiffs expences in his Suit to recover the Dammages, which may perchance be far more than his Dammages ſuffered by the Defendant.*

In a *Replevin* brought, and a ſpecial verdict thereupon

upon found, Coſts and Dammages ſhall be given on either ſide, according as the iſſue ſhall be found upon the determination of the matter in Law.

If a judgment be given upon a *nihil dicit*, in an Action of Debt brought in the Common Pleas, that Court will give Coſts and Dammages, and ſo is it uſed to be done in inferiour Courts. *Trin. 24. Car. B. r. It is ſo in this Court alſo.*

If entire Dammages be given in an Action brought for divers ſeveral things, whereas it is not poſſible to have Dammages for ſome of them, the Dammages ſhall be accounted to be given for thoſe things only for which Dammages may be given, and the expreſſing the other things ſhall be accounted idle & void. *Trin. 24. Car. B. r. For the Law will not preſume the Jury to find impoſſible things, though they may ſometimes find impertinencies.*

If an Action of Treſpaſs be brought, and the Defendant pleads, and the Plaintiff will not joyn iſſue with the Defendant, and he is non-ſuit for want of joyning iſſue and entring upon Record, he ſhall pay the Defendant Coſts, for his falſe vexation of him, by the Stat. of 4. *Jac.* 3. *And upon very good reaſon; For it ſhall be intended, that if he had had good cauſe of Action againſt the Defendant, that he would not have become nonſuit; but would have gone to a tryal, whether he had cauſe of Action, or not.*

But if the iſſue be entred, after one default made by the Plaintiff, the Defendant may make the Record by *Niſi prius*, and try it as if the Plaintiff had proceeded of his own inclinations, and at his own Coſts, and ſuch tryal is ſaid to be a tryal by *Proviſo*.

When

When a judgment is given by default in an Action of Debt, then the Court doth aſſeſs the Dammages, and not the Jury. *Mich.* 1649. *B. r. For there is no iſſue tried by the Jury, and ſo they cannot aſſeſs Dammages, and yet it is not reaſon but that the Plaintiff ſhould have his* Dammages *which are in effect confeſſed by the Defendant, by ſuffering a judgment by default to be againſt him.*

If an Action of Treſpaſs be brought againſt divers perſons, and ſome of them plead to iſſue, and others do not, and the Iſſue is found for the Plaintiff, and Dammages are given as well againſt thoſe that joyned not in the iſſue, as againſt them that joyned in the iſſue; theſe Dammages are well given. *Mich.* 1649. *B. S. For the Treſpaſs is found, and that the Plaintiff was damnified ſo much by reaſon thereof, and the Treſpaſs being brought againſt divers ſhall be accompted a Treſpaſs done by them all, if it be found againſt any one, though the reſt did not plead to iſſue; for it was their own faults they did it not, and the Law will the rather account them guilty.*

If Dammages be aſſeſſed, and it is not expreſſed that they are aſſeſſed, *pro Miſis & Cuſtagiis*, this is erroneous; for it doth not appear by the Record, for what the Dammages are aſſeſſed as it ought to do. *Hill.* 1649. 31. *Jan. B. S. For Records ought to be certain and not ambiguous, whereby either the Court may be inveigled of any party prejudiced thereby.*

All Coſts in *Replevin* and *Avowry* are given *ex aſſenſu partium*, (that is) by the conſent of the Plaintiff; if they are taxed for the Plaintiff, and of the Defendant if they were taxed for the Defendant. *By* Woodward Clark. *Hill.* 1649. 4. *Feb. B. S.* Q.

If

If the Defendant, whoſe title is concerned, in an *Ejectione firmæ*, will not defend his title to the Land in queſtion, and the verdict do paſs againſt the Plaintiff, the ejector may releaſe the Dammages. 11. *Feb. Hill.* 1649. *B. S. For they do properly belong to him in Law, and the Court will not take notice of him whoſe title is concerned, if he will not appear to defend it.*

One that ſues in *forma pauperis*, if the Cauſe go againſt him, yet he ſhall pay no Coſts, if he were admitted to ſue in *forma pauperis*, in the ſuit which paſſeth againſt him, before the ſuit began: for it ſhall be intended by his admiſſion to ſue in *forma pauperis* before his ſuit commenced, that he was not able to pay coſts; but if he were admitted to ſue in *forma pauperis, pendente lite*, (that is) whilſt the ſuit depended, he ſhall pay coſts; for it may be he was able to pay coſts when he began his ſuit, and coſts have relation to the whole ſuit. See the Statute. 23. *H.* 8. *cap.* 15. By Rolle *Chief Juſtice*; *who ſaid, It had been ſo* (*anciently*) *held and ruled.* 16. Nov. 1650. *B. S. But Q. what Coſts, whether the Coſts of the whole ſuit, or only with relation from the time he commenced his ſuit, to the time he was admitted to ſue in* Forma pauperis.

In a Writ of Dowr, if the Plaintiff recover, and yet doth not deſire a Writ of enquiry of Dammages to recover the Dammages, the Court may tax the Dammages, 5. *Feb.* 1650. *B. S. To avoid charges, and this is in favour of Dowr.*

The Court may encreaſe the Dammages, which are found by the Jury, upon a Writ of enquiry of Dammages, in an Action of Aſſault, Battery and Wound-

Wounding; if they ſee cauſe, upon the view of the party that was beaten and wounded. *Trin.* 1651. *B. S. This was done in the Caſe of* Davis *Plaintiff, and the Lord* Foliot *Defendant; for of ſuch a matter of fact the Court is as well able to judge as a Jury, and ſhall be judged to be as indifferent betwixt the parties.*

The Court will not compel the party that is non-ſuit in a Cauſe, to pay his Coſts upon the non-ſuit; but if the party will not pay them when they are taxed, the Court will not ſuffer him to commence his ſuit again until he have paid them. *Paſc.* 1652. *B. S. For if they ſhould ſuffer it, this would encourage men to be vexatious.*

After judgment is given in a Cauſe depending in this Court, the Court cannot make a Rule for the payment of the Coſts which were expended in proſecuting the ſuit. *By* Rolle *Chief Juſtice.* 1655. B. S. *For after judgment the parties are out of Court, for the Cauſe is determined.* Q. *And he ought to do it of courſe, and if he refuſe to do, the Court will grant an attachment.*

No other Coſts or Dammages ſhall be given upon a Recovery, in an Action brought upon the Statute of 2. *Edw.* 6. for not ſetting forth of Tythes, than the Dammages which are expreſſed in the Statute, which is treble dammages. 1655. *B. S. For the courſe of the Common Law, in ſuch caſes is altered by the Statute, and it ſhall be intended, that the Plaintiff hath better ſatisfaction thereby; and the Statute is to be followed.*

By *Glyn Chief Juſtice* in a tryal at the Barr. *Hil.* 1655. *B. S.* Between *Wood* and *Junſton*, If an Action be brought for words ſpoken at three ſeveral

ſeveral times, the Jury may give Dammages for the ſpeaking of them at one of thoſe times; for the Plaintiff may have three ſeveral Actions for them.

Deputies.

The Common Law doth in many Caſes take notice of Deputies, but it doth never take notice of under-Deputies. *Trin. 23. Car. B. r. As of the under-Sheriff, who is but the Sheriffs Deputy, ſub-Almoner, or Deputy-Almoner. For in many Caſes, an Officer may by Law make a Deputy; but a Deputy hath no power to depute another under him: for the ſame reaſon the Deputy of a Deputy might make a Deputy,* & ſic in infinitum; *which would be very miſchievous.*

The King by his ſpecial Commiſſion may make Deputy Eſcheators, to finde an Office, after the death of an Honourable Perſon. *Paſc. 24. Car. B. r. As of a Duke, Earl, Marqueſs, Viſcount, Baron,* &c. Q. *Whether in ſome ſpecial Caſe he may not do it after the death of one that is not of the Nobility. It ſeems he may, and there is no prejudice to any by doing it.*

Default.

Before a verdict is taken by Default, the Cryer of the Court doth call the Defendant three times; and then if the party do not appear, the Plaintiffs Counſel doth pray the verdict may be ſo entred. *Hill. 21. B. r. He is called three times, to ſhew that the Law doth not do things raſhly againſt any one, but with circumſpection,*

ſpection, and with favour (as much as may be without injuſtice) towards offenders.

Debt.

An Action of Debt doth lye againſt the Husband, for goods which were delivered as ſold unto the Wife, becauſe the Law doth intend, that they were employed and came to the uſe of the Husband. *Hill. 21. Car. B. r. And the Husband and the Wife are but one perſon in Law, and the Law intends that a man hath the government of his Wife, and that the Wife doth not any thing without the leave of her Husband, but by his direction or licence, and for his good, though it too often falls out otherwiſe, to the great prejudice of the Husband. It was held quite contrary in a ſpecial verdict between* Manby *and* Scot, *lately argued by all the Judges in the Exchequer-Chamber* : Ergo Q.

If there be an erroneous judgment given for the Plaintiff in a perſonal Action in the Common Pleas, and thereupon he brings an Action of Debt againſt the Defendant upon the erroneous judgment in this Court, the Action will well lye here, until the judgment in the Common Pleas be reverſed by a Writ of Error. *21. Car. B. r. For an erroneous Judgment is not void but voidable; and till it is Legally made void, it ſhall be intended to be a good Judgment. But when it is made void by a Writ of Error, then there is no ground to ſupport the Action of Debt, ſo that then it cannot be maintained.*

If one do aſſume upon a conſideration, moving from *I. S.* to perform a thing which concerns *A. B.* and do not perform it, *I. S.* may bring an Action of the Caſe upon the Aſſumpſit againſt him, that did ſo aſſume upon himſelf. *Mich. 22. Car. B. r. For the*

Action

Action is grounded upon the promise made, to I. S. *upon the consideration moving from him, and the not performing it to* I. S. *to whom it was made, is a sufficient breach to ground an Action.*

In some case, an Action of Debt will lye, though there be no contract betwixt the party that brings the Action, and him against whom the Action is brought. *Mich.* 22. *Car. B.r. For there may be a duty due to one without any contract,* viz. *created by the Law, for which an Action will lye.*

An Action of Debt lies against a Sheriff for moneys which he hath levied by vertue of a Writ of *fieri facias*, for the party that did recover the moneys; for the Law doth create a privity by the *fieri facias*, betwixt the Sheriff and the party that sued out the *fieri facias. Mich.* 22. *Car. B.r. And the money levied is the Plaintiffs due, which the Sheriff is tyed by Law to pay him.*

If an Action of Debt be to be brought against an Administrator for Rent which was due by the Intestate upon a Contract made betwixt him and the Intestate in his life time; the Action must be brought in the County where the Contract was made; but if an Action of Debt be brought against an Administrator, for Rent due for Lands, lett by the Plaintiff to the Intestate, but growing due in the time of the Administrator, *viz.* since the Letters of Administration were granted unto him, the Action must be brought in the County where the Lands do lye for which the Rent is due. *Mich.* 22. *Car. B.r. For in the former Case, the Action is meerly brought upon the Contract made with the Intestate; but in the latter Case it is brought in respect of the interest which the Administrator hath in the Lands out of which the Rent issues.*

An

An *Indebitatus* generally is not good to create a Debt, but there muſt be ſomething elſe made appear to the Court to make a Debt to be due to the party that brings an Action of Debt, or elſe the Action will not lye; for he muſt ſhew for what he was indebted, and for how much, ſo that the Court may adjudge, whether the Debt for which he declares, may be lawfully ſued for in that Action. *Mich.* 22. *Car. B. r. For elſe to declare upon an* Indebitatus aſſumpſit, *is no more than if the parties declared upon a* nudum pactum.

An Action of Debt doth lie for a Councellor, or for an Atturney for their Fees againſt the party that retained them. *Mich.* 22. *Car. B.r.* Q. *Whether it lie for a Councellor, for his Fee, i* honorarium Quiddam, *and not* mercenarium, *a Gratuity rather than Wages or a Salary.* By *Rolle* Chief Juſtice. *But if it be upon a ſpecial retainer, I conceive an Action will without all doubt lie for a Councellor.*

An Action of Debt doth lie upon a perfect Contract in Law betwixt the parties, and ſo doth an Action upon the Caſe. 22. *Car. B.r.* Q. *Which is in its nature, only like a Bill in* Chancery, *ſetting forth a particular Caſe, and praying a general and an equitable remedy, where the Law gives not a particular one.*

An Action of Debt brought againſt an Executor, for Rent grown due in the time of the Executor, ought to be brought in the detinet and debet. *Hill.* 22. *Car. B.r. So then ſaid to be adjudged in* Royton *and* Mees *Caſe. But if the Action be brought for Rent due in the life of the Teſtator, the Action ought to be brought in the detinet only; for then it cannot be ſaid it is owing to the Executor, becauſe it was owing to the Teſtator*

Teſtator in his life time, but it may properly be ſaid to be detained from the executor, becauſe he is intitled by Law to receive it; but if the rent grow due in the time of the Executor, then it may be ſaid to be both owing, and alſo deteined from him. Q. de hoc: *and* vide *Hargraves.*

An Action of Debt lies againſt the Mareſchal of the Kings Bench for ſuffering a priſoner in execution, to go into the Country with a keeper, to return at a certain day. *Dyer.* 278.

So is it upon any eſcape, againſt him, or any other Gaoler. 1. *R.* 2. 12. *Com.* 36.

Where a certain ſum of money is to be paid upon an Obligation at ſeveral daies of paiment, expreſſed in the Condition of the Obligation, though the mony be not paid accordingly, yet an Action of Debt cannot be brought for any part of this money until all the days of payment expreſſed in the Obligation be paſt. *Paſc.* 24. *Car. B.* r. *Becauſe the penalty of the Obligation, which is an entire thing, and cannot be apportioned, is to be recovered which is not wholly due until the whole Condition be broken, which is not ſo until the party fail in the laſt day of payment.*

But I take the Law to be otherwiſe in Caſe of an Obligation with Condition, or in Caſe of a penal Bill, for it is a Rule in Law, That a penalty can be but once forfeited: and it will not be denyed me, but that upon the firſt non-payment, there is a breach of the Condition; *Ergo*, there is a forfeiture by that one breach, of the whole Obligation: but in Caſe of a ſingle Bill, it is otherwiſe, *cauſa patet.* And ſo I take the intent of the books to be, which treat of this matter.

If

If one deliver neceſſaries to an Infant, *viz.* meat, drink, or cloaths, and he promiſe to pay for them, An Action of Debt will lie againſt the Infant upon this promiſe if he perform it not, but to this Action *Infra ætatem* is a good Plea, and the Plaintiff ſhall be thereupon put to prove the particulars, and that they were neceſſary. But if the party come to an account with the Infant for what is due unto him from the Infant, and thereby doth ſtate the ſum due unto him, an Action of Debt doth not lie againſt the Infant for the moneys ſtated to be due unto the party upon this account. *For the Infant can no way be prejudiced by ſuch a promiſe, if it be proved, as it muſt be upon the tryal, that the Infant had ſuch neceſſaries, and that they were reaſonably worth what he promiſed to pay for them, and therefore it is but juſtice that he ſhould be compelled to pay for them. But where the Infant and the party accompt the Infant may be over-reached in the account, and therefore the Law which protects Infants will not compel him to pay the Debt ſtated upon the accompt. Trin. 24. Car. B. r.*

If a woman ſole be indebted, and then take a husband, the Debt is now thereby become the Debt of the husband and of the wife; that is to ſay, the wives proper Debt, and the husbands Debt in the right of his wife, and the wife ought to be ſued for this Debt together with her husband, and if the husband dye, whereby the Action is abated, yet the wife may be ſued again for this Debt. *Trin. 24. Car. B. r. For the death of the husband doth not extinguiſh the Debt, but doth only abate the Writ.*

A Judgement was Reverſed in this Court by a Writ of Error, becauſe it was given to recover a Le-

gacy. *Trin.* 24. *Car. B.r. For a Legacy is not recoverable at the Common Law, but in the Eccleſiaſtical Court, or in the Chancery.*

An Action of Debt doth not lie upon a Judgment given in this Court after the Record thereof is removed by a Writ of Error out of this Court into the Exchequer Chamber. *Trin.* 23. *Car. B.r. It is held otherwiſe at this day, becauſe the tranſcript only, and not the Record it ſelf is removed.*

An Action of Debt doth not lie againſt an Executor which is grounded upon a ſimple contract made by the Teſtator. *Hill.* 1649. *Jan.* 31. *B.r.* Q. *Becauſe the Executor is not privy to ſuch contract, and ſo knows not how to plead to ſuch an Action, or wage his Law; but an* Indebitatus aſſumpſit *well lies.*

9 i Sid 333

An Action of Debt doth lie againſt a Gaoler for ſuffering a Priſoner in Execution to eſcape, by the party at whoſe Suit the Priſoner was committed in Execution; for upon the eſcape the Law makes the Gaoler a Debtor to him whoſe Priſoner is ſuffered to eſcape. *Trin.* 1650. *B.r.* 15. *Junii. Or an Action upon the Caſe to recover his dammages ſuffered by the eſcape.*

One may bring an Action of Debt for Rent in what County he pleaſeth. 9. *Nov.* 1650. *B.r. Becauſe it ſounds not in the Realty.* Q. tamen de hoc.

If a judgement be given for the Plaintiff, in an Action of Debt in the Common Pleas, and afterwards the tranſcript of the Record is removed into this Court by a Writ of Error, yet the Plaintiff for whom the Judgement was there given, may bring an Action of Debt there, upon that Judgement; becauſe the Record of the judgment is not removed, but

but only the tranſcript or Copy of it, ſo that notwithſtanding the Writ of Error, and removing the tranſcript, they have the Record of the judgment there to ground the Action upon: but if the Judgment be Reverſed in this Court upon the Writ of Error, and after the party proceed in the Common Pleas in his Action of Debt, the party againſt whom he thus proceeds, may bring his *Audita Querela* to be relieved againſt this Action. 3. *Feb.* 1650. *B. S. For by the reverſal of Judgement the ground of the ſecond Action is deſtroyed, and ſo the Defendant is wrongfully vexed by ſuch proſecution, for which an* Audita Querela *doth lie.*

One may joyn two Debts due upon two ſeveral Obligations, from the ſame party in one Action of Debt. 6. *Feb.* 1650. *B. S. And declare in one Declaration upon the ſeveral Obligations. For there is no prejudice done to the Defendant by doing it, but rather a favour, in ſaving him expences.*

By *Glyn* Chief Juſtice. *Trin.* 1658. Where the Gaoler doth ſuffer a priſoner for Debt to eſcape voluntarily, and wilfully, there cannot be an Action brought again for the ſame Debt againſt the priſoner; for there the Gaoler is lyable for the Debt. But it is otherwiſe where the eſcape is ſuffered by negligence. *Q.*

If one do deliver goods to *I. S.* to my uſe, if the party to whom they were delivered, do refuſe to deliver them unto me, I may either have an Action of Debt or an Action of Accompt for them, againſt him to whom they were delivered at my election. 22. *Ap.* 1651. *B. S. For the delivery of them to my uſe, doth veſt the property of them to me.*

Deeds.

Such conſtruction ought to be made of a Deed, that it may agree with the intent of the parties to the Deed, if their intent do not contradict the Rule of Law. *Hill.* 22. *Car. B. r. And that their intent may be known by the Deed.*

A Deed of Indenture made betwixt two, ought to be Sealed and Delivered by both parties to the Indentures, otherwiſe it cannot be ſaid to be a Deed indented. *Trin.* 23. *Car. B. r. For though it be called an indenture from the indenting of it, yet that indenting doth ſuppoſe it to be made at leaſt betwixt two parties, who ought to ſeal and deliver the ſeveral parts, or elſe it cannot work as an indenture, though if but one part be ſealed, it may ſometimes work as a Deed-Poll to barr the party that ſealed it.*

If all the parts of a Deed may by Law ſtand together, no one part of that Deed ſhall be ſo interpreted as to make either the whole Deed or any part of it to be void. *Paſc.* 24. *Car. B. r. For this would be a comment to deſtroy the text, and not to explain it.*

A Deed cannot be delivered as an eſcrow to the party himſelf, who is to take by the Deed. *Trin.* 24. *Car. B. r.* 1650. *Trin. B. S. For the delivery of it to the party, who is to take by the Deed, makes it the parties Deed who delivered it, and ſo it muſt work upon the deliverers of it.*

If a Deed do ſay, *This Indenture made*, whereas the the Deed is indented, yet it may be a good Deed, to ſome effects, for it may work as a Deed-Poll, though it cannot work as an indenture.

If

If it do not appear by the Fabrick of a Deed, that Lands do paſs by the Deed, by way of Feoffment; yet the Land may paſs by it by way of uſe if there be a conſideration, which is ſufficient in Law to raiſe a uſe expreſſed in the Deed. *For if a Deed can by any conſtruction of Law be conſtrued to have any Legal operation, the Law will not make it utterly void though it cannot operate as the Fabrick of the Deed purports it ſhould.*

Ejectment.

If one ſeal a Leaſe of Ejectment to try a title of Land, it is not neceſſary to give notice of the ſealing of this Leaſe unto him whoſe title is concerned, but it is ſufficient to give notice of the Leaſe to the Tenant or Undertenant of the Land in queſtion. *Hill. 23 Car. B. r. For the poſſeſſion of the Land is primarily in queſtion in this Action, and is to be recovered and not the title of the Land, which poſſeſſion doth properly concern the Tenant of the Land, be the title in whom it will; though the title of the Land doth alſo come in queſtion and is tryed collatterally. But now by the new way of practice, it is not uſual to Seal any Leaſe of Ejectment at all in an Action of Treſpaſs and Ejectment, but the Plaintiff that intends to try the title, delivers a Declaration to an Ejector of his own making, and that Ejector ſends or delivers the Declaration to the Tenant in poſſeſſion, who gives notice thereof to his Leſſor, whoſe title is concerned to defend the title, and if neither the Tenant in poſſeſſion, nor his Leſſor will defend the title, then the Ejector will confeſs a*

Judgement to the Plaintiff, and ſo the Tenant will be ſtripped out of poſſeſſion, but if they or either of them will defend the title, then it is uſual for them to move the Court that they may be made Ejector to defend the title, which the Court will grant if they will Confeſs Leaſe, Entry, and Ouſter, at the tryal, and ſtand meerly upon the title; and if at the tryal they do not, then Judgement to be entred againſt the Plaintiffs Ejector.

If one do occupy the Lands in queſtion in an Action of Treſpaſs and Ejectment, after the Ejectment Leaſe made to try the title of the Land is Sealed; this is an Ejectment in Law of the Lands in queſtion. *Trin.* 22. *Car. B. r. For the keeping of poſſeſſion of the Lands againſt him to whom they are let by the Leaſe doth amount to an Entry upon him, although he to whom the Ejectment was made by vertue of Leaſe*, nota, *was never in poſſeſſion of Land let.*

If there be two Ejectors made in an *ejectione firmæ*, one of them may be found guilty of the Treſpaſs and Ejectment; and the other, as the caſe may fall out, may be acquitted. *Trin.* 22. *Car. B. r. And yet the Action is well brought, becauſe there is a Treſpaſs and Ejectment found againſt one of the Defendants.*

An Ejector in Law, is any perſon that comes upon any part of the Land, &c. in the Ejectment Leaſe although it be by chance, and with no intent to diſturb the Leſſee of the poſſeſſion, next after the Sealing and Delivery of the Ejectment Leaſe; and ſuch an Ejector is a good Ejector, to bring an Action of *ejectione firmæ* againſt, to try the title of the Land in queſtion. *Mich.* 22. *Car. B. r.* 1650, *B. S. And there*

is no conſiderable prejudice to any perſon by having ſuch an Ejector; but it is ſuffered for the more ſpeedy diſpatch of Juſtice.

He that is to try a title of Land by an Action of Treſpaſs and Ejectment, ought not to make an Ejector of his own againſt whom he may bring his Action, or to conſent, or agree with one to come upon the Land let in the Ejectment Leaſe, with an intent to make him an Ejector, and to bring his Action againſt him. *Mich.* 22. *Car. B. r. For by that means the Tenant in poſſeſſion of the Land, was often put out of poſſeſſion, by a Writ of* habere facias poſſeſſionem, *without any notice given either to him or his Leſſor of the Suit. But now this is altered by the new way of practice formerly mentioned. Q. in which way there may prove the greater inconveniences.*

In every *ejectione firmæ*, the Plaintiff ought to ſet forth in his Declaration, in what Pariſh the Lands in queſtion do lye, that the *venue* may be from the place where the Lands do lie, and not from the body of the County, except it be when as the Lands in queſtion do not lie in any Vill or Hamlet. *Mich.* 22. *Car. B. r. Or* lieu Conus, *for in all ſuch cauſes, it is of neceſſity that the Jury be of the body of the County, becauſe there is not any other more particular and certain place from whence the* venue *may come.*

If one declare upon a Leaſe, in an *ejectione firmæ*, and that by vertue of that Leaſe, he was in poſſeſſion of the Lands thereby let unto him, until that he was Ejected by the Defendant, it is ſuppoſed that the Leſſor that made the Leaſe unto him, was alive at the time when he brought his Action. *Mich.* 22. *Car. B. r. For otherwiſe the Leſſee might have no cauſe of Action for his Leaſe might poſſibly be determined by the death of the Leſſor.*

An Ejectment or an Ouſter, is either an actual Ejectment, as when the Leſſee is actually put out of the Land let unto him, or elſe it is an Ejectment by implication of Law, *viz.* where ſuch an act is done by one which doth amount to an Ejectment, although he do not really enter upon the Land let, and ouſt the Leſſor. *Paſc.* 22. *Car. B. r.*

An *ejectione firmæ* ought to be brought for a thing that is certain, and not of an uncertain thing. *Paſc.* 23. *Car. B. r. For if the thing be uncertain, the Sheriff cannot if the Plaintiff recover, know of what to deliver the poſſeſſion upon the Writ of* habere facias poſſeſſionem, *and conſequently there can be no fruit of ſuch an Action, which the Law doth alwaies labour to prevent.*

If the Plaintiff in an *ejectione firmæ*, do declare for a houſe lying in two Pariſhes, if the houſe do lye in either of the Pariſhes, and do not lye in both of them, yet is the Declaration good. *Paſc.* 23. *Car. B. r. For there is certainty enough in it.* Q.

Although in an *ejectione firmæ* there be a Verdict and a Judgement againſt the Plaintiff, yet the Plaintiff may bring another Action of Treſpaſs and Ejectment for the Land. *Trin.* 23. *Car. B. r. He may bring divers Actions one after another if he pleaſe, for a Judgement in that Action is not final; for it is but to recover the poſſeſſion of the Land, and is not like an Aſſize, or a Writ of right,* &c. *wherein the title of the Land is primarily concerned.*

By *Rolle* Chief Juſtice, It is doubtful whether an *ejectione firmæ* do lie *de uno croſto. Trin.* 23. *Car. B. r. For the incertainty of the word* Croſt, *what it is, and what it doth contain.* Q.

If a Leaſe of Ejectment to try the title of Lands

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in the poſſeſſion of *I. S.* be made to one, and after the Leaſe is made, the Wife of *I. S.* or the ſervant of *I. S.* do keep the poſſeſſion of the Land for *I. S.* and *I. S.* do after this occupy the Land, *I. S.* is an Ejector againſt whom an Action may be brought to try the title of the Land. *Mich.* 23. *Car. B. r. Paſc.* 24. *Car. B. r. For* I. S. *his occupation of the Land after the poſſeſſion of thereof kept by his wife or ſervant doth imply that the poſſeſſion thereof was kept for him, and by his direction, and they were but his inſtruments, and were to gain nothing by keeping the poſſeſſion.*

One who hath title to the Land in queſtion in an *ejectione firmæ*, may upon motion to the Court be made a party to the Action, that he may thereby defend his title, if he will confeſs the Leaſe, Entry, and Ouſter *Hill.* 23. *Car. B. S. Vid. ſupra. According to the new way of practice.*

If a Leaſe of Ejectment be made of a houſe and lands, occupied with it, to try the title of them, and the Wife of the occupyer of the houſe and land continue in poſſeſſion of the houſe, after the Ejectment Leaſe is made, ſhe is an Ejector, as to the houſe, but not as to the Lands. *Paſc.* 1652. *For there may be divers Ejectments upon one Leaſe.*

He who is in any part of a Meſſuage, *viz.* in the Barn, Stable, Stall, *&c.* after the Leaſe of Ejectment Sealed and Delivered to try the title of the Meſſuage, is an Ejector for the whole Meſſuage. *Paſc.* 24. *Car. B. r. For a Meſſuage is an entire thing, and is not to be recovered* per partes.

The preſent owner of the Land may conſent with the party that claims the Land to make an Ejector to try the title of it, if it be not a plot betwixt him and

and the Ejector. *Mich.* 24. *Car. B. r.* viz. *To ſtrip the Tenant of the Land in poſſeſſion, out of his poſſeſſion of it; for the Law doth not countenance fraud.*

If divers perſons come together upon the Land in queſtion, next after the Ejectment Leaſe, to try the title of the Land, is Sealed and Delivered; it is in the election of the Plaintiff that intends to try the title, to bring his Action againſt all of them, or againſt which of them he pleaſeth. 1650. *B. S. For if the Plaintiff have right, they be all Treſpaſſors, and it is no wrong to bring the Action againſt any of them.*

If a Leaſe of Ejectment be made to one to try a title of a houſe, and the Leſſee to whom the Leaſe is made, go into the Entry of the houſe, to make his Entry by vertue of the Leaſe, and one that is in the houſe ſhut an inner door of the houſe, and keep the Leſſee out of an inner room of the houſe; this is not an Ejectment, nor is that perſon ſuch an Ejector as an Action may be brought againſt. *Mich.* 1650. *B. S. For when he is entred in at the door of the houſe, he is in poſſeſſion of the houſe, and is not Ejected out of it, though he have not poſſeſſion of the whole houſe; for the Ejectment muſt be of the whole thing for which the Action is brought.*

An *ejectione firmæ* doth not lie of a cloſe of land without expreſſing either the name or the nature of the Land. *Hill.* 1649. 30. *Jan. B. S. Becauſe it is not known certainly what is meant by a Cloſe without ſome deſcription of it, either by its name or nature. It was then ſaid an* ejectione firmæ, *doth lie of a Croft of Land,* ſed Q. *for it was formerly doubted.*

If one ſeal a Leaſe of Ejectment, and do thereup-

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on give his Leſſee poſſeſſion of the Lands let, and the Leſſee is not ejected at that time, the Leſſee may enter into the Lands again at another time by vertue of his former entry and poſſeſſion; and if the Leſſee be then Ejected, he may bring an Action of Treſpaſs and Ejectment upon this Ejectment. *Paſc.* 1650. *B. S.* 10. *Maii.*

An *Ejectione firmæ* doth lye of a Cottage. *Paſc.* 1650. 12. *Maii. For it is a word of a certain ſignification.*

Evidence.

In an Action upon the Statute of Hue and Cry brought by one *Oliver* a Carrier againſt the Hundred of *Wallington* in *Surrey*: *Oliver* who was robbed, was admitted by the Court to give Evidence to the Jury to prove he was robbed, and the place where.

The Allegation of the Councel at the Bar, is no Evidence to the Jury, but the matter which enſues upon this Allegation, to prove it is good Evidence upon a tryal at the Bar. *Mich.* 22. *Car. B.* r. *For Evidence to a Jury ought to be given upon the oaths of Witneſſes, or upon matters of Record, or by Deeds proved, and other like authentical matter; but the allegation of the Counſel is oftentimes but what they apprehend is fit to be ſpoken for the beſt Advantage of their Clyents Cauſe, and not according to the truth of the fact.*

Witneſſes who are to be made uſe of, to give their Teſtimony at a tryal at the Barr, if by reaſon of ſickneſs or otherwaies are not able to travel and come to the tryal, may by order of the Court be examined

amined upon Oath touching their knowledge, in the Country where they live; and their Depoſitions ſo taken are to be admitted to be read as Evidence to the Jury at the tryal. *Mich.* 22. *Car. B. r. But otherwiſe, this is not admitted to be done, becauſe it is accompted the beſt and faireſt way to find out the truth to examine them in Court before the Judge before whom the tryal is, and in the preſence of the Councel on both ſides.*

Depoſitions taken in Chancery, may by order of the Court be read as Evidence to a Jury upon a tryal at the Bar by the Plaintiff, or the Defendant, or both, if the Depoſitions were taken in the cauſe which is to be tryed at the Bar, and between the ſame parties that are Plaintiff and Defendant in the tryal. *Mich.* 22. *Car. B.r. And ſo it is of Bills, Anſwers, Replications, &c. in Chancery.*

But if the parties that Depoſed in Chancery be living at the time of the tryal, they ought to be examined *ore tenus* in Court, and their Depoſitions are not in ſuch caſe to be made uſe of. *Paſc.* 1650, *B, S. For the reaſon aforeſaid.*

The admittance of one to be an Adminiſtrator in an inferior Dioceſs, is a Bar againſt the perſon that doth ſo admit him to give Evidence at a tryal, that the Inteſtate had not *bona notabilia* in divers Dioceſſes at the time of his death. *Mich.* 22. *Car. B. r. For ſuch Evidence would be contrary to what he hath formerly admitted, and ſo it would be to ſuffer the party to diſprove by others what he hath alread himſelf granted.*

The Court will not permit the Jury upon a tryal at the Bar, to carry any Writings with them out of the Court, as Evidence for them to conſider of, but

but such as are under Seal, and have been proved in Court. *Mich. 22. Car. B. r. For others are of no credit and are no part of the Evidence which they are to consider upon.*

An Evidence given to a Jury, may be answered by the Councel, either by confessing and avoiding it, or else by encountring the Evidence given, with giving stronger Evidence and of greater credit on the other side. *Mich. 22. Car. B. r. Which is upon the matter a denyal of the Evidence given on the other side to be true by proving the contrary.*

A thing which is concluded in the Ecclesiastical Court which doth concern Lands, is not to be given in Evidence to a Jury at a tryal concerning those Lands. *Mich. 22. Car. B. r. For the Courts of Common Law are not to be guided by their proceedings, nor are they to be urged to a Jury in Evidence to sway their consciences.*

A person that may be admitted as a Witness, at a tryal may give words in Evidence to the Jury which were spoken to him by another person, who by the Rules of the Court might not be admitted as a Witness at the tryal. *Mich. 22. Car. B. r. For it is but matter of Evidence, and is left to the Jury how far they will give credit to them, and it is lawful for one that is admitted as a Witness to give any thing in evidence which may concern the matter in question.*

It is not of necessity that a Deed or a Record given in Evidence to a Jury, be shewed in Court; but if it be proved that there was such a Deed, or such a Record as are given in Evidence, it is sufficient. *Trin. 23. Car. B. r. For a Deed or a Record may be imbezled or lost, and so not to be produced; but in such a case the tenour of the Record must be punctually proved by a*

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true Copy thereof ſworn unto by one which examined, who is likewiſe to give an account when he delivers his Evidence where the Record is.

The Judges of the Court cannot try a matter of Fact in queſtion, upon a Demurrer to an Evidence, and therefore the Plaintiff and the Defendant muſt agree upon it and confeſs it. *Trin.* 23. *Car. B.r. For elſe the Court will not proceed to deliver their opinions touching the matter in Law demurred upon; becauſe if the matter of fact be not agreed, there can be no judgment given in the cauſe, which way ſoever the matter in Law fall out to be.*

Matter in Law ought not to be given in Evidence at a tryal, but only matter of Fact is to be given in Evidence, and the matter in Law, if there be any that is diſputable, is to be reſerved to be ſpoken to in Arreſt of Judgment, or are to be found ſpecially. *Trin.* 23. *Car. B.r. For the Jury are only to try matters of fact.*

If a Fem Covert acknowledge a thing at a tryal, which is for the preſent advantage of her Husband, but is for her own future diſadvantage, yet this is no good Evidence to a Jury. *Mich.* 23. *Car. B. r. For her Husbands preſent advantage, is Hers alſo, and is more looked upon than her future diſadvantage.*

Nota: A Fem Covert ſhall not be admitted to be a Witneſs for or againſt her Husband, and ſo it was reſolved in the Chequer Chamber in Sir *James Croſts* Caſe, *in Cov. Litt.*

The Defendants Councel ought to conclude by way of anſwer to the Evidence that was given unto the Jury by the Plaintiffs Councel. *Paſc.* 24. *Car. B.r. For if the Plaintiffs Counſel doth begin the Evidence,*

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it is reaſon the Defendant ſhould ſpeak in anſwer to that Evidence, becauſe he is upon the defenſive part, and is to give an anſwer to all that is ſaid againſt him in matter of Evidence, but the Plaintiffs Councel after this, is to ſum up his Evidence to the Jury, which is no more, than to put them in mind how he hath proved his caufe.

An ancient writing that is proved to have been found amongſt Deeds and Evidences of Land may be given in Evidence to a Jury, although the executing of it cannot be proved. *Mich. 24. Car. B. r. For it is very hard to prove things that are very ancient, and the finding it in ſuch a place, is a preſumption, that it was preſerved as a thing of value and to be made uſe of, and is left to the Jury what credit they will give to it according to circumſtances.*

A writing that is permitted to be read, to prove one part of an Evidence given to a Jury, may be read to prove any other part of the whole evidence to be given. *Mich. 24. Car. B. r. For it is but to make the whole truth of the cauſe appear.*

If the Plaintiff or Defendant will give ſome part of an anſwer in Chancery in Evidence to a Jury, the Court may order that the whole anſwer be read. *Mich. 24. Car. B. r. That the Court and the Jury may the better conſider what it makes to the Evidence, and it may be if part only be read, it may prove good Evidence for the party, whereas the whole anſwer taken together may be againſt him, and ſo by reading of part the truth may not be diſcovered.*

He that takes out a Copy of part of a Record, out of any Office, with intent to give the Copy in Evidence in a Jury, muſt take out ſo much of the Record, at leaſt, as doth any wayes concern the matter

ter in queſtion at the tryal, or elſe the Court will not ſuffer ſuch Copy to be read in Evidence to the Jury. *Paſc.* 1650. 2. *Maii. B.r. For if it be not ſo taken out, it cannot be ſworn to be a true Copy of ſo much of the Record as concerns the matter in queſtion, which is to be done before it can be read; for the Record is to be taken with relation had to each part of it as they ſtand together to make up the whole Record, and if any part be left out, a right Judgement cannot be given upon the Record.*

A tranſcript of a Record which is in another Court, or an Enrolment of a Deed may be given in Evidence to a Jury. *Mich.* 1649. *B. S. For they are things to be credited, being made by Officers of truſt, who ſhall not be preſumed to do falſe things.*

Upon a tryal at the Bar, the Councel of that party who doth begin to maintain the iſſue; that is, to be tryed whether it be the Councel of the Plaintiff, or the Councel of the Defendant ought to conclude the Evidence. *Paſc.* 1650. 1. *Maii. B. S. That is, only ſum up his Evidence given; but if he give new Evidence, the other party hath liberty to anſwer it or encounter it with other Evidence.*

If any one of the Jury that is ſworn to try the Iſſue, be deſired to give his Teſtimony concerning ſome matter of Fact that lies in his particular knowledge, and concerns the matter in queſtion as Evidence, to his fellow Jurors, the Court will have him examined openly in Court upon his Oath, touching his knowledge therein, and he is not to deliver his Teſtimony in private unto his fellow Jurors. 31, *Oct.* 1650. *Mich. B. S. For the Court and Councel on both parts, are to hear the Evidence given on either*

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ſide as well as the Jury; that it may be anſwered by the other party if need require, and that the Court may direct the Jury to find according to the Evidence.

Memorandum: At a tryal at the Bar, between *Baxter* and *Foſter*, concerning the title of Land, a Copy of an inſcription upon a great ſtone in *London* was admitted in Evidence to prove a pedigree. *Mich.* 1656. *B. S.*

In the caſe of *Miller* Plaintiff, and *Collumbine* Defendant, upon a tryal at the Bar, in an Action of Treſpaſs and Ejectment. It was ſaid by *Rolle* Chief Juſtice, *That an Office which is found after the death of one that died Seiſed of* Capite *Lands, in a County wherein the Lands found in that Office, do not lie, but in another County, may notwithſtanding it was not found in the County where the Lands do lie, be given in Evidence to a Jury that is to try the title of thoſe Lands, if there was a ſpecial Livery granted unto the Heir of thoſe Lands.* 1654. *B. S. For this preſumes there was a ſpecial direction for finding this Office in this extraordinary way.*

The Plaintiff or the Defendant may make an *Affidavit* in there own cauſe depending here, and it may be filed; but it may not be admitted in Evidence of the tryal of the cauſe betwixt them. *Mich.* 1656. *B. S.*

The Jury may view Depoſitions taken in Chancery, if they be exemplified under the great Seal, and they may alſo have them with them from the Bar, to conſider of as part of the Evidence; but if they be not exemplified under the great Seal, they may only look upon them at the Bar, but not have them with them out of the Court. 1655. *B. S. For they are not ſo authentical if they be not exemplified under*

ſeal: for the ſeal gives them the Teſtimony of the Court of Chancery it ſelf that they are true, but without exemplification, they paſs only upon the credit of the examiner, who is but an Officer in Court.

If one do produce a Leaſe made upon an Out-lawry, in Evidence to a Jury to prove a title; he muſt alſo produce the Out-lawry it ſelf; for the Out-lawry is the ground of the Leaſe, and by conſequence, of the title which is to be proved: but if he produce the Leaſe to prove other matter, he needs not to ſhew the Out-lawry, but may have the Leaſe only read in Evidence, but in both caſes he muſt prove the Leaſe; and ſo it is of an extent without ſhewing the Statute or Judgment on which the extent is grounded. So held in a tryal at the Bar between *Johnſon* and *Spencer. Paſc.* 1655. *B. S.*

In a tryal at the Bar in a Treſpaſs and Ejectment between *Williams* and *Scot*, It was ſaid by *Glyn* Chief Juſtice, That an entry in an Heralds Book is no good Evidence to prove a pedigree to prove one to be heir to the Land in queſtion; for they are no matters of Record.

Emparlance.

If the Plaintiff do amend his Declaration at any time after it is delivered to the Defendants Atturney or after it is filed in the Office in any thing that is matter of ſubſtance, the Defendant may by the Rules of the Court, Emparle to the next Term after that the Declaration is ſo amended, if the Plaintiff do not pay coſts to the Defendant for his amendment; but if the Defendant do accept of coſts of the Plaintiff, then the Defendant cannot Emparle. *Mich.* 22. *Car.*

Car. B. r. For by ſuch amendment, it ſhall be accompted as a new Declaration; but if the Defendant doe accept of coſts for ſuch amendment, it is intended that he is ſatisfied for what he is prejudiced by the amendment, and therefore it is reaſon he ſhould plead to the Declaration ſo amended, and not Imparle.

In what Term ſoever a declaration comes in againſt the Defendant, the Defendant may by the Rules of the Court Emparle to the next Term after, before he can be compelled to plead. *Mich. 22. Car. B. r. For the Law doth not force anyone to do any thing raſhly and without advice, but gives the party time to deliberate what to anſwer for himſelf.*

Where the Defendants Caſe doth neceſſitate him to plead a ſpecial Plea, and the matter is difficult which is to be pleaded; the Court upon a motion made to inform them of it, will, if the Defendant deſire it, grant him longer time to Emparle and put in his plea than otherwiſe by the Rules of the Court he ought to have. *Hill. 22. Car. B. r. But without a motion and leave of the Court he cannot take time to plead, becauſe the Court is to judge whether it be neceſſary to plead ſuch a Plea, as requires longer time to conſider of than ordinary, and ſhould it be otherwiſe, the Defendant might upon ſuch pretences delay the Plaintiff without cauſe.*

Where the Plaintiff doth keep any Deed or Writing, or other thing from the Defendant, which doth belong unto him, and whereby he is to make his defence, and is diſabled by the detaining thereof to plead for his beſt advantage; the Court upon motion and information thereof, will grant an Imparlance to the Defendant, until the Plaintiff do deliver

it unto him, and a convenient time after, till he can draw up his Plea. *Hill.* 22. *Car. B. r. For the Law doth give every Defendant convenient time to make his beſt defence; and in this caſe, if the Defendant be delayed, it ſhall be adjudged his own fault.*

Upon a motion for an Emparlance in a caſe between *Aire* and *Goodwin. Mich.* 1656. *B.S.* It was ſaid by *Glyn* Chief Juſtice, That if a Clerk of this Court do ſue another, the Defendant cannot Emparle, but muſt plead preſently, and ſo it is, if a Clerk of this Court be ſued he cannot Imparle, but muſt plead preſently.

Alſo in all caſes where the Plaintiff in his Declaration, or the Defendant in his Plea alledgeth a *profert in Curia* of the Deed or Adminiſtration, *&c.* there the Defendant ſhall not be forced to plead, nor the Plaintiff to reply until he hath ſeen the Deed or other evidence, and taken a Copy of it at his own coſts if he pleaſeth.

poſt 404

If the Plaintiff alter the *venue* from the place where he firſt laid it, the Defendant may Emparle to the next Term after. *Trin.* 23. *Car. B.r. For thereby he may be forced to alter his Plea, which may require time to conſider of.*

If the Plaintiff do declare againſt the Defendant but doth not proceed further thereupon for three whole terms after, the Defendant may Emparle to the next Term by the Rules of the Court. *Hill.* 23 *Car. B.r. For by his delay, he might think the Plaintiff would not proceed and may be thereby unprovided of a Plea.*

By *Glyn* Chief Juſtice. *Trin.* 1656. *B.S.* In the Caſe of *Leonard* and *Osbalſton*. It was ſaid, That if the Defendant in Aſſault and Battery be Out-lawed, and come in upon the Out-lawry, and the Plaintiff declares againſt him, he ſhall not Emparle to the next Term,

Term, but muſt plead preſently and go to tryal that Term. *For he hath delayed the Plaintiff already too much by ſtanding out to the Out-lawry.*

If the Plaintiff amend his Declaration, and pay Coſts to the Defendant, the Defendant may not Emparle, but if the Plaintiff give the Defendant a new Declaration, or do ſo amend the old Declaration, that is upon the matter a new Declaration, then the Defendant may Emparle. *Mich.* 1654. *B. S. Cauſa qua ſupra.*

By *Rolle* Chief Juſtice, if the Plaintiff and the Defendant have proceeded ſo far, as to Iſſue in the Cauſe, and after the Defendant do amend his Plea, the Defendant ſhall pay the Plaintiff Coſts, becauſe by the amending of the Plea after Iſſue, the Plaintiff may be put to extraordinary Charges in new drawing up the Iſſue, yet the Court will not grant an Emparlance unto him, although the Cauſe be not entered in the Judges book for tryal, if there be warning given to the Defendant of the tryal. 1655. *B. S. For after Iſſue joyned, and warning given for a tryal upon that Iſſue, it is too late to Imparle.*

The Court would not grant the Defendant an Imparlance, though he was ſued upon an old Bond of of 28. years old, and could not ſee the Bond; but bid him pray Oyer of it, and plead. In the Caſe of Mr. *Edward Johnſon* of the Inner Temple. *Paſc.* 1656. *B. S. For the praying Oyer is the proper way to have a ſight of it, and to have a Copy of it, and till he have Oyer, if he pray it, he need not plead, and the antiquity of the Bond is no cauſe of Imparlance.*

Executor.

If one be indebted to *I. S.* in a certain sum of money, and *I. S.* makes his Will, and deviseth this debt due unto him, unto *A. B.* and makes *I. L.* his Executor and dies; this debt devised unto *A. B.* must be paid unto *I. L.* the Executor, and not to *A. B.* the devisee. *Mich.* 22. *Car. B. r. For the Executor and not the Devisee can give a sufficient discharge for this debt; and the Debt is part of the Testators estate for which the Executor only is responsable.*

If a *Scire facias*, be brought against an Executor to shew cause why he should not pay a debt unto the Plaintiff recovered against the Testator; the Executor cannot plead fully Administred, but he must plead that no goods of the Testator are come to his hands whereby he might discharge the Debt. *Mich.* 22. *Car. B. r. For he may have fully Administred, and yet be liable in Law to pay the Debt demanded upon the* Scire Facias, viz. *when goods of the Testators shall afterwards come to his hands.*

An Executor which hath Administred goods of the Testator as Executor, or that is Executor of his own wrong, by disposing of the goods of the party deceased, without authority given unto him, cannot waive a term of years for Land, &c. of which the deceased dyed possessed of. *Mich.* 23. *Car. B. r. For he hath charged himself to be answerable to all persons concerned, as far as the deceased parties personal estate will amount unto. But if the term will not be Assets, he may waive the term.* Trin. 24. Car. B. r, *For it is to no purpose to accept it.*

An Executor of his own wrong, is not by Law chargeable

chargeable for more than the value of the goods of the deceaſed doth amount unto, and which did come unto his hands, and with which he hath intermedled. *Mich.* 23. *Car. B.r. Becauſe he is not impowered by Law to recover any more of the eſtate, as an Executor authoriſed by the probate of a Will is.*

The word Executor, is a word collective, and doth comprehend in it, the Executor of an Executor. *Hill.* 23. *Car. B.r. For he is accountable for the firſt Teſtators goods, and is as it were his Executor for ſuch goods as remain unadminiſtred by the firſt Executor.*

An Executor may recover a duty which was due to the Teſtator, although the Executor was not named in the creation of that duty. *Trin.* 22. *Car. B.r. For he repreſents the very perſon of the Teſtator, and the Teſtators eſtate belongs to him.*

An Executor may be charged upon a Collateral promiſe made unto the party by the Teſtator, if the promiſe was broken in the life time of the Teſtator, elſe not. *Mich.* 149. *B. S.* And 16. *April.* 1650. *B. S. For by the breach of the promiſe there accrued a duty to him to whom the promiſe was made from the Teſtator, but before it is broken it is no duty.*

Endictment.

An Endictment that is framed upon a Statute, ought to purſue the words of the Statute. *Trin.* 23. *Car. B. r. For ſuch an Endictment is founded upon the Statute only, and muſt not therefore ſwerve from it.*

The Juſtices of Aſſize will ſtay the proceedings upon an Endictment againſt a perſon for a thing done by him, during the time of war, and in relation

to the war. *Trin. 23. Car. B. r. For Indictments are to be preferred againſt perſons that act any thing in the diſturbance of a peaceable and ſetled Government; but in time of War, there can be no ſuch ſetled peace and Government.*

If any one be perjured in an Affidavit made in any Court of Record, touching any cauſe depending in that Court, an Indictment may be preferred againſt him, for this is perjury upon the Statute of 5. *Eliz. c.* 29. *Trin. 23. Car. B. r.*

An Indictment of forcible Entry, doth not lie upon the Statute of 8. *H.* 6. againſt one for entring forcibly into a Copy-hold, for ſuch eſtates are not mentioned in the Statute of 8. *H.* 6. nor are within the equitie of that Statute; but an Endictment doth lie in ſuch a Caſe, by the Statute of 21. *Jacob. Hill.* 23, *Car. B. r. For they are empriſed within that Statute.*

Although exceptions be taken againſt the Endictment, to the intent the Court ſhould quaſh it, yet the Court will grant time to maintain the Endictment unto the Kings Councel, if they deſire it. *Hill.* 23. *Car. B. r. For the maintenance of Endictments is for the good of the Common wealth, and the King is principal concerned in it.*

The Court doth not uſually quaſh Endictments for perjury, although the Endictments be faulty, but will put the party to plead to the Endictment. *Hill.* 23. *Car. B. r. For perjury is counted a great offence, and therefore the Court doth not favour ſuch offenders, and if the Endictments be not good, the parties Endicted may avoid them by pleading, and it is but* ex gratia *that the Court doth quaſh Endictments, and they are not bound to do it* ex Officio.

An

An Endictment ought to be more certain than common pleadings in Law need to be. *Hill.* 23. *Car. B.r. Becauſe they are more pœnal, and ought to be more preciſely anſwered unto.*

An Endictment ought to expreſs the year of our Lord in which it was taken. *Hill.* 1649. 30. *Jan. B.r. For it ought to be certain in the time, as well as in other matters.*

If an Endictment be drawn ſo general and ſo uncertain, that the party Endicted cannot tell how to make a certain anſwer unto it, ſuch an Endictment is not good, but may be quaſhed. *Paſc.* 24. *Car. B. r. For otherwiſe the Defendant would be enſnared thereby.*

If a word be left out in an Endictment, which is but only in matter of form, yet the Endictment is good, but if it be in matter of ſubſtance it is not good. *Trin.* 24. *Car. B.r. For it is the ſubſtance of pleadings that is moſt regarded, though formality be not to be neglected.*

If one be Endicted for doing of any thing, for which he is not by the Law to be Endicted for, as for the encloſing of a Common, or ſome other Treſpas for which an Action at the Common Law is to be brought; ſuch an Endictment is not good, but may be quaſhed. *Paſc.* 24. *Car. B. r. For Endictments are to be preferred for Criminal and not for Civil matters; and then likewiſe the Delinquent is liable to be twice puniſhed for one offence, which is againſt* Magna Charta.

If one do interrupt a long continued poſſeſſion of Lands by an unlawful means, and the perſon that is ſo interrupted of his poſſeſſion, do regain his poſſeſſi-

on

on by unlawful means alſo, yet an Endictment of forcible entry doth not lye againſt him for doing thereof. *Mich.* 24. *Car. B. r. For the Law favours long poſſeſſions, and doth not countenance the diſturbers of them, and this but* vim vi repellere, *which is not puniſhable in many caſes.*

In moſt Caſes the Endictment for a Fact done, ought to be laid in that County where that Fact was done; for it ſhall be intended that there may the beſt conuſance of the fact be had, and conſequently the faireſt tryal. But this holds not in all Caſes. *Mich.* 24. *Car. B. r.* And *Mich.* 25. *Oct.* 1650. *B. r.*

If one be Endicted at the Seſſions in *London*, or in any other County, and the party Endicted do remove the Endictment by a *Certiorari* into this Court, and do not thereupon quaſh the Endictment, the party that did remove it, ought by the Rules of the Court, to try the Endictment at his own coſts the next Term after that the Indictment is removed. *For the removing of it is in favour of the Defendant, and he ſhall not by reaſon thereof be ſuffered to delay or put the proſecutor thereby to extraordinary charges* 13. *Nov.* 1650.

When an Endictment is ſpecial, that is, when it is grounded upon ſome ſpecial matter of fact, the Evidence given upon the tryal of this Endictment, muſt prove this ſpecial matter, and maintain the Endictment, but if it be a general Endictment, it is not ſo. 21. *Car. B. r.*

An Endictment muſt be certain, that the party Endicted may know how to plead to it, or traverſe, or elſe it is not good, but may be quaſhed. *Hill.* 21. *Car. B. r. Becauſe there can be*

no Tryal upon it, by reason of its incertainty.

An Endictment ought to be in Latin, or else it is not good, but may be quashed, except it be an Endictment taken before the Commissioners of Sewers, which may be in English. *Hill.* 21. *Car. B.r.*

The Parish in which the fact was done, for which the party is Endicted, ought to be named in the Endictment. 21. *Car. B.r That the party Endicted may be the plainlier described.*

An Endictment doth lye against one that speaketh blasphemous words. 21. *Car. B. r. It lay then at the Common Law, but now by a late Act, it lies only for speaking of some blasphemous words named in that Act. But Q. Whether it now lie at the Common Law for speaking any other blasphemous words, not mentioned in the Statute. It seems it doth not.*

An Endictment for a nusance doth lie against the owner or proprietor of a Ship that is sunk in a Haven or port. 21. *Car. B.r. For thereby the trade of that place, where the Haven or that Port is, is hindred, and also navigation, which is prejudicial to the Common wealth; for it is chiefly maintained by navigation.*

An Endictment that is framed upon a Statute ought to pursue the words of the Statute, or else it is not good. *Mich.* 22. *Car. B. r. For the offence being made by the Statute, for which the party is Endicted, it is reason the Statute should be punctually recited, that it may plainly appear that the offence of the party Endicted is within the Statute.*

One that is convicted upon an erroneous Endictment cannot move after his Conviction to have the Endictment quashed, but must bring his Writ of Error to reverse the judgement given against him upon the

the Endictment. *Mich.* 22. *Car.B.r. For after Judgement it is too late, for an Endictment is quashed for the insufficiency in it, or because no good Judgement can be given upon an erroneous Endictment; but if Judgment be given upon an erroneous Endictment, it is good, till it be reversed by a Writ of Error.*

The Court will not quash an Endictment, that is preferred for the publick good, although it be not a good Endictment, but will put the party Endicted to traverse it, or to plead unto it. *Mich.*22. *Car. B. r. For it is by the favour of the Court, that any Endictment is quashed, for if the Court please, they may force the the party to traverse or plead to any Endictment, be it good or bad, for it is no prejudice to the party Endicted.*

An Endictment removed by a Writ of *Certiorari* into this Court, may be sent back again into the County or place, whence it was removed, if there be cause to doit. *Mich.* 22. *Car. B. r. That there may be a tryal had upon it where it was first laid.*

If an Action upon the Case be brought against one for calling another Thief, and the Defendant doth justifie the words, and upon the tryal it be found for the Defendant, an Endictment may be forthwith framed against the Plaintiff to try him for the Felony. *So it was done in Mich.* 21. *Regis nunc, in the Case of one* Perry, *who was after executed at* Tyburn. *Mich.* 22. *Car. B.r. For the Felony appears to the Court by the Verdict found for the Defendant.*

An Endictment doth lie against one that cheates another at play with false Dice. *Hill.* 22. *Car. B.r. Or for any other way of cheating at play, or otherwise; For cheating is a high Crime against the Common*

Common Wealth, as well as against the party cheated.

An Endictment doth not lie for a private nusance or other iujuries, because the nusance or injury done, is not made *ad commune nocumentum*, but *ad privatum*, and therefore an Action upon the Case doth only lye for the party that is damnified by this nusance or injury. *Hill. 22. Car. B. r. 11. Maii. 1651. For Endictments are to punish publik offences only, and done against the publick peace, and not to punish private Trespasses, for which the Law gives particular Actions.*

An Endictment lies against one for assaulting and stopping of another in his passing in the Highway. 22. *Hill. Car. B. r. For it is a breach of the publick peace.*

One that is Endicted for Felony, may have Councel Assigned him to speak for him. *Pasc. 23. Car. B. r. But such Councel are only to speak for him in matter of Law, and not concerning matters of Fact, for that doth depend upon proof of Witnesses.*

Although a Bill of Endictment be preferred to a grand Jury upon Oath, yet they are not bound to find the Bill, if they find cause to the contrary, and on the other side, although a Bill of Endictment be preferred unto them without Oath made, yet they may find the Bill if they see cause. *Pasc. 23. Car. B. r. But it is not usual to prefer a Bill unto them, before Oath be first made in Court, that the evidence they are to give unto the grand Enquest to prove the Bill is true.*

Every Endictment ought to be preferred against the party for some offence committed by him, either against the Common Law, or against some Statute.

Trin.

Trin. 23. *Car. B. r. And not for every ſlight miſdemeanour.*

There ought to be fifteen dayes between the preferring of an Endictment and the convicting the party Endicted. *Trin.* 23. *Car. B. r.* Q. *In what caſes, for I conceive it holds not in all.*

An Endictment lies againſt one that makes a falſe oath, in an anſwer to a Bill in Chancery, or in an Affidavit made in a cauſe depending there, or in any other Court of Record. *Trin.* 23. *Car. B. r. But* Q. *for what falſe oath made in an anſwer it lyeth, for it hath been held, that though the whole anſwer be not in all points true, yet an Endictment lies not, becauſe anſwers in the Chancery are drawn by councel, and not the party himſelf, but Affidavits are intended to be drawn up by the parties that make them.*

Where the party Endicted is Out--lawed upon the Endictment, the Court will not quaſh the Endictment, although it be erroneous, but will force the party Out-lawed, to bring his writ of Error to reverſe the Out-lawry. *For before the Out-lawry reverſed, the party Outlawed can have no benefit of the Law. Mich.* 24. *Car. B. r.*

An Endictment may be amended the ſame Term it is brought into the Court by the Clerk of the Peace, but the next Term after he cannot amend it. *Paſc.* 24. *Car. B. r. For though the Law will give way as much as is requiſite for the maintaining of Endictments; becauſe it is intended they are preferred* pro bono publico, *yet it will not permit that the party Endicted ſhall be unneceſſarily delayed by the proſecutor, from coming to a juſt vindication of himſelf for the Crime for which he ſtands Endicted.*

If only a word of form be left out in an Endict-

ment,

ment, yet the Endictment is good, but if one word of ſubſtance be omitted, the whole Endictment is naught. *Paſc.* 24. *Car. B.r. For though the Law doth regard form in the proceedings thereof, yet it is matter of ſubſtance that is chiefly aimed at in all proceedings.*

An Endictment of forcible entry, doth lye for a Tenant for years, who is forcibly put out of his poſſeſſion. By the Statute of 21. *Jac. Paſc.* 24. *Car. B.r. But before that Statute no ſuch Endictment did lie.*

Upon an Endictment preferred againſt one in the Kings Bench, there doth iſſue out an Attatchment againſt the party Endicted, to force him to appear to the Endictment. *Paſc.* 1650. *Mich B. S. and to traverſe or plead to it, or to move to have it quaſhed.*

Expoſition.

The beſt Expoſition of the Statute Law, is to be had by the conſulting with the makers of them, and how they did in their times interpret them. *Hill.* 23. *Car. B r. For they knew beſt for what end they made the Statutes, and*

Contemporaria expoſitio legis eſt optima.

The word *videlicet* in a Deed, is put to expound or make plain the premiſes of the Deed in which it is put, and not to deſtroy it or make it ambiguous, and therefore that which it brings in, ought not to be contrary to it, for if it be, the *videliset* is void. *Paſc.* 23. *Car. B. And the Deed ſhall be taken as if it were left out.*

If all the words of a Deed can ſtand together without

out any abſurdity, the Law will make ſuch an Expoſition of them, that the whole Deed may be good in Law. *Paſc.* 24. *Car. B. r. Becauſe the ſenſe of the parties to the Deed is collected out of the whole Deed*; Ut res magis valeat quam pereat.

Election.

An Action of Treſpaſs upon the Caſe, or an Action of Treſpaſs *vi & armis*, may be brought againſt one that doth reſcue a Priſoner, at the Election of the party who is damnified by this reſcuous. *Paſc.* 24. *Car. B. r. Yet the Judgements are different in theſe two Actions*; *for in Treſpaſs* vi & armis, *the judgement is entred with a* capiatur pro fine, *for the diſturbance of the publick peace by the Reſcuous*: *but in bare Action on the Caſe, the judgement is entred, that the Defendant be in* miſericordia.

Where one may bring an Action of Waſt, for Trees cut down upon his Land, it is at his Election to bring an Action of Waſt, or elſe an Action of Trover and Converſion for the Trees. *For though it be moſt for his advantage to bring an Action of Waſt*; *yet he may waive that advantage if he pleaſe, for none is prejudiced thereby but himſelf. Mich.* 24. *Car. B. r. But both he cannot bring.*

An Action upon the Caſe, or an Aſſize, doth lye againſt him that doth ſurcharge a Common, at the Election of him that is injured thereby. *Mich.* 1649. *B. S. For it is all one whether the Plaintiff recover the thing for which he ſues, or dammages for his prejudice ſuffered by the loſs of it.*

If a Priſoner eſcape, that lies in priſon upon an execution; an Action of Debt lyes againſt the Gaoler that

that ſuffered this eſcape, for the party at whoſe ſuit he was in execution; for the whole debt and dammages for which the priſoner lay in execution, which is aſcertained by the judgement: but if he were not a priſoner in execution, and do make an eſcape, it is in the Election of the party at whoſe ſuit he was a priſoner, either to bring an Action upon the Caſe, or an Action of Debt againſt the Gaoler for this eſcape. *An Action of Debt to declare againſt him, as he did, or might have done againſt the priſoner that eſcaped, in order to receive this Debt: or an Action upon the Caſe, to recover what dammages he ſuſtains by the eſcape ſuffered. Trin.* 1650. 15. *Junii. B. r.*

If the Plaintiff amend his Declaration, it is at his Election, either to pay the Defendant Coſts for this amendment, or to give the Defendant an emparlance to the next Term after the amendment; and the Defendant cannot hinder this Election. 7. *Feb.* 1650. *For the Defendant is at no prejudice by it; becauſe he is recompenſed by the Coſts, and therefore it is no reaſon that the Plaintiff ſhould be delayed by an Emparlance.*

Eſtople.

A recital in an Obligation is an Eſtople, againſt which he that made the Obligation ſhall not be permitted to plead any thing to the Contrary, if an Action be brought againſt him upon this Obligation. *Paſc.* 24. *Car. B. r. For that were to contradict his own act and Deed, and the recital ſhall be intended to be true, and not to be contradicted.*

If one enter into an Obligation by the title of an Eſquire, whereas in truth he is a Knight; if an Action

be brought againſt him upon this Obligation, and he is named an Eſquire, he ſhall be Eſtopped to ſay in his Plea, that he was not an Eſquire, but a Knight, at the time he entred into the Obligation, in abatement of the Writ. *Hill.* 1649. *B. S. For* conſtat de perſona, *that he was by his own admiſſion the ſame perſon that entred into the Obligation; and did then admit the title of Eſquire to be his true addition, and inſiſted not upon it that he was a Knight.*

Where one hath liberty by Law, to confeſs and avoid the matter which the Plaintiff doth ſet forth in his Declaration againſt him, there he cannot be Eſtopped to plead ſuch matter for his defence. 29. *Jan.* 1649. *Hill. B. S. For this were to deprive him from the benefit of the Law.*

Extinguiſhment.

If one have uſed to hold a Court by cuſtom (as by Law he may) if he do afterwards purchaſe Letters Patents, to enable him to hold this Court; he hath thereby extinguiſhed the Cuſtom, and muſt now hold the Court by vertue of his Letters Patents. *Mich.* 24. *Car. B. r. For the party hath thereby waived the Cuſtom, and hath made Election to hold his Court by another Authority, and both Authorities cannot ſtand together.*

Error.

The want of a Bill, in the Kings Bench, is Error, although the Plea Roll contains a Declaration; becauſe the Bill is the Original Proceſs there. and if there be a Bill, and the Defendant plead not till a year

year after, yet all the continuances are entred upon the Bill, and when the Defendant pleads, then the Declaration is entred upon the Plea-Roll thus. *Et modo ad hunc diem, ſcilicet diem, &c. iſto eodem Termino, uſque quem diem, dictus Defendens habuit licentiam ad Billam prædict' interloquendi, & hinc ad reſpondend' &c.*

If a Writ of Error be brought to reverſe a Judgement, and afterwards this Writ of Error is diſcontinued for want of proſecution of the party; yet execution cannot be had upon the judgment, until this diſcontinuance of the Writ of Error be certified from the Court where the Writ of Error is diſcontinued, unto the Court where the judgment was given. 21. *Car. B.r. For before ſuch certificate, the Court where the judgement was given, cannot take notice of the diſcontinuance of the Writ of Error, and before it be either diſcontinued, or the judgment affirmed here execution cannot be taken out. But where a new writ of Error may lie* & granted alibi 103 200

A Writ of Error lies in the Kings Bench, to reverſe a judgment given in *Ireland*, in the Kings Bench there. 27 *H.* 7. 33.

A Writ of Error out of the Chancery lies upon a judgment in moſt Caſes given in this Court, in the Exchequer Chamber, before the Judges of the Common Pleas and Barons of the Exchequer, by the Statute. 27 *Eliz.* 8. 31 *Eliz.* 1.

The aſſignment of the General Error upon a Writ of Error brought, is to ſay, that the Declaration was inſufficient, and that judgement was given for the Plaintiff, whereas it ought to have been given for the Defendant, and ſuch like general matters, without alledging any particular colourable matter of Error in the judgment. 21. *Car. B.r. Yet this is uſually done, and the Errors inſiſted upon not ſhewn until* Rolls Abr. Error 761.

after the Record be opened in Court, and further day given to ſpeak to it.

A Writ of Error doth lie for one that is committed by a Juſtice of the Peace, for a forcible entry committed by him. *Trin. 22. Car. B.r. For the commitment is grounded upon a Judgment given by the Juſtice againſt the party committed, and he may bring a Writ of Error to reverſe this Judgment, that he may regain his liberty.*

All parties are grieved by an erroneous Judgement, may joyn in a Writ of Error to reverſe the judgment; for this ſtands with juſtice: but perſons that are not damnified by it, cannot joyn with others that are damnified by it, to reverſe it. *Mich. 22. Car. B.r. For the Law will not favour any to ſue who have no cauſe, nor are concerned.*

The Bail cannot joyn with the Principal in a Writ of Error, to reverſe a judgment given againſt the Principal. *22. Car. B.r. For the principal muſt reverſe the Judgement alone if it be erroneous, becauſe it was only given againſt him, and not againſt the Bail: except a* Scire facias *be brought againſt the Bail upon the judgment, and judgment be given againſt the Bail upon that* Scire facias, *for then he is grieved by the firſt judgment.*

Errors to a judgment ought to be aſſigned upon the Record. *22. Car. B.r. That they may appear to the Court, who are to judge of them.*

No perſon ſhall be compelled to bring a Record into the Court, to make an Error in another Record. *Mich. 32. Car. B.r. For the Law doth favour matters of Record, and will affirm them rather than queſtion them, without apparent and Legal cauſe ſhewn to the contrary.*

If

If a Judgment given in an inferiour Court be entred in this manner, *ideo conſideratum eſt*, and the words *per curiam*, are omitted, as they ought not to be the judgment is erroneous: but if a judgment given in a ſuperior Court; *viz.* in any of the Courts at *Weſtminſter* be entred, and the words *per curiam* are omitted, yet the judgment is erroneous. *Mich.* 22. *Car. B. r. For inferior Courts are tied to obſerve their ancient forms of proceedings, and not to vary from them; but the ſuperior Courts have more liberty to vary in ſome caſes.*

He that hath obtained a judgment, if he find that it is Erroneous, may move the Court to have it reverſed for his own diſpatch; which the Court will do when they are ſatisfied what the Error is. *Mich.* 22. *Car. B. r. For till ſuch a judgment is reverſed, the Plaintiff cannot bring a new Action for the ſame Cauſe for which that judgment was given: for if he ſhould, the Defendant may plead the judgment in Bar of his ſecond Action.*

If the Defendant, after judgment given againſt him, do bring a Writ of Error to reverſe the judgement, but doth not certifie the Record into this Court by the Return of his Writ, the Court will grant that the Defendant may have execution upon the judgment. *Mich.* 22. *Car. B. r. For though the Law doth not favour unneceſſary delayes in the proceedings thereof.*

If a judgment be given in any of the Cinque Ports, if the Defendant will bring a Writ of Error to reverſe it, he muſt bring his Writ of Error before the Warden and Conſtable of *Dover*, and not in this Court. *Mich.* 22. *Car. B. r. This is one of the Priviledges that belong unto thoſe that inhabit within any of the Cinque Ports, or members thereof not to be ſued out of their own precincts.*

If an erroneous judgment be given in any of the Sheriffs Courts of the City of *London*, the Writ of Error to reverse this judgment, must be brought in the Court of Hustings before the Lord Major. *Hill. 27. Car. B. r. For that is the superiour Court, in respect of the Sheriffs Courts.*

A Writ of Error that is brought in the Parliament, is made retornable immediately. *Pasc. 23. Car. B. r. Because that Court during the Session of it, sit continually and hath no vacation, and it is for the honour of that high Court to be immediately attended, that they may do the speedier justice.*

A Writ of Error to reverse a judgment, ought not to be brought before the judgment is signed. *Pasc. 23. Car. For before it is signed it is no judgment, and the Writ of Error runs thus,* Si judicium sit redditum. *Yet it is usual to do it in inferiour Courts, to prevent execution, which they will presently take out upon the judgment entred.*

Q. *Whether the Heir may bring a Writ of Error, to reverse an erroneous Judgment given in a personal Action against his ancestor, which Judgment doth charge the Lands of the Heir.* Trin. 23. Car. B. r. *It seems he may, because he may be prejudiced by the judgment.*

He that brings a Writ of Error to reverse a Judgment in some Actions, ought by the Statute to put in good Sureties to pay the Debt recovered, and the charges of the Judgment, and those that shall be caused by bringing the Writ of Error; in Case the Judgment shall be affirmed and not reversed upon the Writ of Error. *Trin. 23. Car. B. r. For it is reason the party should have recompence for his causeless vexation and delay.*

When

When a Writ of Error is brought to reverſe a Judgment, the party that brings the Writ muſt cauſe the Roll where the Judgment is entred to be marked, whereby the other party may take notice upon the Record, that the Writ of Error is brought; and this marking of the Roll is a *Superſedeas* in it ſelf, to hinder Execution to be taken out upon the Judgment, but if the Roll be not marked, Execution may be taken out upon the Judgment, notwithſtanding the Writ of Error; but if Execution be taken out after it is marked, the party grieved may have a *Superſedeas, quia erronice emanavit*, to make void the Execution. *Mich.* 23. *Car. B.r. But now the practice is to ſhew the Writ to the Plaintiffs Attorney under Seal, and that is a* Superſedeas *after allowance, and Bail put in.*

It is not uſual for the Court of Common Pleas, upon a *certiorari*, directed to them upon a Writ of Error brought to reverſe a Judgment given in that Court to Certifie the Record into this Court; to Certifie the Original Writ, upon which the Action was commenced there, for that Writ is to remain with the *Cuſtos brevium* of that Court, to warrant the the bringing of the Action, and all the proceedings thereupon. *Mich.* 23. *Car. B.r.*

A Writ of Error is not to be brought in Parliament to reverſe a Judgment given in the Common Pleas, but the Writ of Error ought to be brought in the Court of the Kings Bench. *Hill.* 23. *Car. B.r. Being the ſupreme Court next under the Parliament.*

The Chief Juſtice only, if there be any, and if not, the eldeſt Judge, and not any other of the Judges of the Court ought to allow a Writ of Error that is

brought. *Hill.* 23. *Car. B.r. Because it is to overthrow a judgment, which is a matter of a high nature, and is pronounced by the Chief Justice, or eldest Judge, though with the consent and assistance of the other Judges, and the King directs his Writs to the chief ministers of Justice in that place whither the Writs are directed.*

If a Judgment given in this Court be erroneous in matter of Fact only, and not in matter in Law, a Writ of Error may be brought, in this Court where the Judgment was given to reverse it; and it is not necessary to bring a Writ of Error in Parliament; but if the Judgment be erroneous in matter in Law, then a Writ of Error cannot be brought in this Court to reverse it. *Pasc.* 24. *Car. B.r.* 1650. *B.S. For Error in Fact is not the error of the Judges, and therefore the reversing of a Judgment given by them which is only erroneous in matter of fact, is not the reversing their own Judgment, but it is otherwise if the Judgment were erroneous in matter in Law; and they cannot reverse their own Judgments, because every act of a Court which is final and erroneous, is to be reversed by a higher authority, and not the same.*

A Writ of Diminution in a Writ of Error, ought not to be granted to be directed to an inferior Court. *Trin.* 24. *Car. B.r. For it shall be intended that the whole Record was at first rectified.*

If he that doth bring a Writ of Error, do discontinue his Writ, before the Defendant in the Writ of Error do plead unto it; he may have a new Writ of Error, but if he discontinue his Writ, after the Defendant hath pleaded *in nullo est erratum* to it, he cannot have a new Writ. *Mich.* 1649. *B.S. For then the Defendant hath joyned Issue upon the Writ brought, but before he hath pleaded he may, for the bringing of the new*

Writ,

Writ, is but the abatement of his own former Writ, and no wayes prejudicial to the Defendant.

If by any poſſibility there may be ſuppoſed to be error in the Record, any perſon that may be damnified by this error may bring a Writ of Error to reverſe it. *Hill.* 1649. *B.S. For although he be not named a party to the Record, yet the Law hath made him a party to it, by ſubjecting him to dammage by it, and it is therefore reaſon he ſhould be permitted to uſe all lawful means to defend himſelf from it.*

A Judgment may be an erroneous Judgment, although it be not given for the Plaintiff, but the Defendant is thereby acquitted; for it may be erroneous in the entry of it, for it may be it is entred with a *Capiatur* againſt the Plaintiff, whereas it ought to be in *Miſericordia pro falſo Clamore. Hill.* 1649, *B.S. Et è contra.* Q. *Whether in ſuch caſe the Plaintiff may bring a Writ of Error.*

A Writ of Error is not like another Writ, for a Writ of Error may be abated as to one perſon concerned in the Judgment, and yet may ſtand good as to another perſon concerned, & ſo cannot another Writ. But if the Writ of Error be brought in a Caſe where it will not lie at all, it muſt be abated in the whole. *Hill.* 1649. *B.S.* 27. *Jan. For there is no ground for the Writ; but in the other caſe the ground remains good.*

All the parties privies to the Record may joyn in a Writ of Error to reverſe it, if it be erroneous. *Hill.* 1649. *B. S. For they are concerned in it, and may be prejudiced by it.*

Q. A Writ of Error may be brought to reverſe a Judgment before a Writ of Enquiry of dammages, which Iſſues out upon the Judgment, be executed. *Hill.* 1649. 2. *Feb. B. S. And this will ſtay*

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the Execution thereof, for that Writ is grounded upon the Judgment.

2. The party who is to have benefit by a Judgement, may bring a Writ of Error to reverſe it, as well as the Defendant. *Hill.* 1649 *B.S.* 4. *Feb. This ſeems to be true, where it concerns himſelf only.*

If a Writ of *habere facias poſſeſſionem*, to deliver poſſeſſion to the Plaintiff, of Lands recovered by him, in an *ejectione firmæ* doth contain in it more Acres of Land, than were contained in his Declaration, the Writ is erroneous, for there is no warrant for ſuch a Writ: but if the Sheriff do deliver poſſeſſion of more Acres of Land than are contained in the Writ, this doth not make the Writ erroneous; for that is the Error of the Sheriff, and not of the Writ: but there an Action upon the Caſe doth lye againſt the Sheriff for doing it, or an Aſſize may be brought againſt him, that hath the poſſeſſion delivered to him, for the ſurpluſage of the Land delivered unto him. 18. *Nov.* 1650. *B.S. For for ſo much he is a Diſſeiſor, becauſe he never recovered it, and ſo ought not to have poſſeſſion delivered him thereof.*

A Writ of Error ought to mention before whom the Judgment was given, for the reverſing whereof it is brought. 31. *Jan.* 1650. *B. S. That it may be the more certain.*

A Writ of Error which is brought to reverſe an Out-lawry, was wont to be ſigned by the King.

If Judgment be given upon a matter, which doth ariſe out of the Juriſdiction of the Court where the Judgment is given, this is an erroneous Judgment. 3. *Feb.* 1650. *B.S. For ſuch a Judgment is given* coram non Judice, *and ſo is void in* toto, *and it is as if no judgment were given.*

If

If a Judgment be entred *quod recuperare debeat*, a Writ of Error cannot be brought to reverſe this Judgment, for it is not a perfect Judgment, for the Judgment ought to be *quod recuperet* in the Preſent Tenſe. 10. *Maii.* 1651. *B. S. Elſe it is not a preſent judgment, but a judgment in expectancy: then a Writ of Error, notwithſtanding what is before alledged, will not lie upon a Judgment entred by Default, or confeſſion in an Action of Treſpaſs, or Treſpaſs on the Caſe, before a Writt of Enquiry executed, and Judgment thereupon; for in ſuch Caſes Judgment is,* quod recuperare debeat.

A Writ of Error doth lie for the Husband to reverſe an Out-lawry againſt his wife. 10. *Maii.* 1650. *B. S. For his own intereſt is concerned in it, and he is bound to defend and vindicate his wife in all lawful things.*

If there be two Writs of Error brought to reverſe one Judgment, and one of the Writs is good, and the other is erroneous, the Court will take that which is good without any conſideration had of the other, if it be to affirm the Judgment. *Trin.* 1651. *B. S. For the Court doth not favour overthrowing of Judgments, where by Law they may be maintained.*

Errors were aſſigned in a Record in the Vacation upon a Writ of Error brought to reverſe a Judgment, and although the Errors were material; yet becauſe they were not aſſigned in the Term, the Writ of Error was quaſhed. *Hill.* 1655. *B. S. For the Court cannot take notice of them, nor proceed to the tryal of them upon ſuch an aſſignment.*

Entry.

Entry.

If one Enter into the houſe of another without his conſent, although the door of the houſe was open when he Entred into the houſe, yet this is a forcible Entry. *Mich.* 24. *Car. B. r. Becauſe it is againſt the will of the poſſeſſor of the houſe; but it is intended of ſuch an Entry, as I conceive, whereby he that enters, doth out the poſſeſſor of the houſe from his poſſeſſion.*

Words alone cannot make an actual Entry and Ouſter, although they be violent and threatning, but there muſt be force uſed by the party to make it ſo. *Mich.* 1650. *B.S. For the word Ouſter doth imply a violent act to be done,* viz. *a violent putting out, and not words ſpoken only.*

If he who hath right of Entry into a Fee-hold in queſtion, do Enter into part of it, this Entry ſhall be accounted an Entry in all that part of it, which is in the poſſeſſion of one Tenant, though he Entred not into all that he poſſeſſed; but if there be ſeveral Tenants poſſeſſed of the Free-hold in queſtion, there muſt be ſeveral Entrys made upon the ſeveral Tenants, in reſpect of their ſeveral intereſts; but if he who hath no right to Enter doth Enter, he ſhall gain title to no more by his Entry, than that part only, whereupon he did make his actual Entry. 8. *Nov.* 1650. *B.S. So note a difference where he that entred it, hath a claim of Entry, and where not, in reſpect of the favour the Law affords.*

If one do make an Entry into Lands, *&c.* in the poſſeſſion of another, and he upon whoſe poſſeſſion, the Entry is made, do notwithſtanding ſuch Entry

try continue in poſſeſſion of the Lands, &c. with his ſervants and cattel, ſuch an Entry is to no effect to gain the poſſeſſion; becauſe he that was in poſſeſſion was not Ouſted by this Entry, for the poſſeſſion of his ſervants and his cattel are his poſſeſſion: but if upon the Entry his ſervants and his cattel be Ouſted from the Land, he that is thus Entred upon, muſt prove that after this he did again make an actual Entry into the Lands, or elſe he ſhall not be judged to have regained his poſſeſſion. 25. *Ap.* 1650. *B. S. For there muſt be an actual re-entry to gain the poſſeſſion againſt an actual Ouſter.*

A ſpecial Entry into a houſe with which Lands are occupied by claiming the whole is a good Entry, as to the whole houſe and Lands to reduce the title to him that makes this ſpecial Entry from him that was in poſſeſſion of it, and upon whom he entred. *Trin.* 1651. *B. S. But a general Entry will not ſerve the turn, a general Entry is an Entry made without any particular claim made unto any other things, than unto that houſe, or piece of Land upon which he Entred.*

If one do live in the houſe with his father, and do continue in the houſe after the death of his father who dyed in poſſeſſion, his continuing there, ſhall not be ſaid an Entry to avoid an eſtate in the houſe. *Paſc.* 1652. *B. S. For it ſhall not be intended that he keeps in poſſeſſion upon any other colour, than as one of his fathers family, left in the houſe at his fathers death, except the contrary do appear.*

If one will diſclaim a Suit, he that doth diſclaim, muſt Enter his diſclaimer upon Record. 1652. *B. S. Or elſe the Court cannot take notice thereof; for of pri-*

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vate Actions between the Plaintiff, and the Defendant, the Court ex officio *are not bound to take notice; and ſuch are all ſuch things as do not appear upon Record.*

Examination.

A witneſs that is to be at a tryal to teſtifie his knowledge there, ought not to be examined in any matters concerning the tryal before the tryal, except the Plaintiff and the Defendant do agree thereunto. *Hill.* 1649. *B. S. For this would be to prepare him for his teſtimony againſt the tryal, which ought not to be, for it is a ſort of tampering with the witneſs, which the Law allows not.*

It is uſual in the Court of Common Pleas, when a Fem Covert levies a fine, for the Judge to examine her, whether ſhe do it willingly or no, before they take the fine; which they will not take without her free conſent. But where a Fem Covert ſuffers a recovery, ſhe is not examined. But *Rolle* Chief Juſtice ſaid, *That he doth alwaies examine a Fem Covert that comes before him to ſuffer a recovery.* 8. Nov. 1650. B. S. *For the miſchief may be as great by the not examining of her in the one caſe as in the other, and therefore it ſeems but reaſonable that equal care ſhould be had in both caſes to prevent it.*

If a Copy of a Will to be made uſe of at a tryal be to be Examined in the Prerogative Office, it ought to be Examined by the Original Will there, if the Original will be in the Office, and not by the Regiſter Book there where the Will is entred. 23. *Ap.* 1651. *B. S. For the Will may be miſentred there, and ſo altered thereby, that it cannot be ſaid to ſpeak the mind of the Teſtator.*

By

By *Glyn* Chief Juſtice, The *Cuſtos brevium* ought to examine the Iſſue to be tryed with the Plaintiffs Atturney before the tryal. *Trin.* 1655. *B. S. That the tryal may not miſcarry, by reaſon of ſome ſlip in the making up the Iſſue; but the uſual courſe is for the Attorney to examin it, and to put his hand thereunto.*

In the Caſe of one *Frith. Hill.* 1658. The Court was moved that a witneſs that was to be at a tryal might be examined before a Judge: But *Glyn* Chief Juſtice denyed it, for he ſaid, *That this would tend to deſtroy the Law, to put evidence in papers, and it is againſt the honour of the Law, and therefore not to be done, but in extraordinary caſes, though the parties will conſent unto it.*

In the Caſe of one *Maſon. Hill.* 1657. After Iſſue joyned, andbefore th e Attorney had entred it he dyed. The Court was moved that it might now be entred, which without motion ought not to be done, and it was granted.

Exemplification.

One may exemplifie a Deed (that is) make a Copy of it under the great Seal in Chancery, and ſo he may anſwer a Bill, and Interogatories in Chancery, and other proceedings there, and ſuch an Exemplification is Authentick, and may be given in evidence to a Jury upon a tryal, 23. *Maii.* 1651. *B.S. Without affidavit that theſe proceedings thus exemplified, are Examined by the Originals.*

A Rule made in the Common Pleas may be Exemplified in that Court. By *Pinſent Preignatory*, and the Court there. 1651. *C. B. The like may be done in this Court of Kings Bench.*

Exigent.

Exigent.

An Exigent againſt two which is returned in theſe words, *Non comparuerunt*, and the words *Nec aliquis eorum comparuit* omitted, is erroneous, and to be reverſed. 21. *Car. B. r. For if any one of the two do appear upon the Exigent, he that appears ought not to be Outlawed, and ſo the return is uncertain; for it cannot be known which of the parties did not appear, nor conſequently which of them is Out-lawed.*

Execution.

By *Glyn.* Chief Juſtice. *Trin.* 1660. If the Record of a Judgment given in the Common Pleas be removed into this Court, the party cannot take out Execution upon the Judgment without a *Scire facias*; for the party againſt whom the Judgment was had, may have matter to ſhew why Execution ſhould not be had.

An Execution may iſſue forth out of this Court, notwithſtanding a Writ of Error be brought in the Exchequer Chamber, to reverſe the Judgment given here; and upon which the Execution is grounded, if this Court be ſatisfied that there is no Error in the Judgment; or if the Record be not duly removed out of this Court by the Writ of Error. *Mich.* 22. *Car. B.r.*

If a Judgment given in another Court, be reverſed for Error in the Kings Bench, the party ſhall have Execution in the Kings Bench. 9. *Aſſ. pl.* 8. 21. *E.* 3. 46.

One may pray for Execution upon a Judgment given

given in the Court where it was given, although a Writ of Error be brought to remove the Record, and to reverſe the Judgment, if he that brings the Writ of Error, do not aſſign his errors in due time. *Mich.* 22. *Car. B. r. Becauſe in ſuch caſe, the Court will hinder the Writ of Error to be brought only for delay.*

The Court may grant Execution upon a Judgment given, although a Writ of Error be brought, to reverſe the Judgment if the Court be ſatisfied, upon examination of the Record, that the Writ of Error is brought meerly to delay the party from his Execution. *Mich.* 22. *Car. B. r. For the Law doth not countenance delayes, but delights to have ſpeedy juſtice done to all parties, though it loves not to ſurpriſe any perſon by over haſty proceedings.*

If Execution be not taken within one year and a day, after Judgment is given in a Cauſe, there muſt be a *Scire facias* taken out to revive the Judgment, and Execution cannot be taken out before ſuch a *Scire facias* is taken forth, and Judgment thereupon obtained. *Mich.* 22. *Car. B. r. But this* Scire facias *may within that time be taken out of courſe without moving the Court, But if Execution be not taken out in ten years after or longer, then a* Scire facias *cannot be taken out to revive ſuch a Judgment without moving the Court, or at the ſide Bar; but upon motion the Court will grant it.*

The Court will not deliver one out of priſon that lies there in Execution upon an Affidavit. But the party may have a Writ of *Superſedeas* to *Superſede* the Execution, if there be cauſe. *Trin.* 24. *Car. B. r. Be the matter contained in the Affidavit never ſo ſtrong for the priſoner, becauſe he lies in priſon by matter of Record, and muſt be delivered by an Act of as*

high a nature which an Affidavit, although it be made in Court, or before a Judge of the Court, and is filed in Court, is not.

The Court cannot divide an Execution which is entire. *Mich. 24. Car. B. r. For this would be to divide the Judgment upon which it is grounded; for the Execution is grounded on the Judgment.*

If the Record be not certified in due time after the Writ of Error is brought to reverſe a Judgment, he that hath the Judgment, may take out Execution of Courſe without moving the Court to have leave to do it. *Mich. 1649. B. S. For it ſhall be intended that the Writ of Error is meerly brought for delay, becauſe the party doth not proſecute it, and it ſhall be all one, as if it had not been brought; for to proſecute faintly and not to effect, is counted in Law no proſecution.*

After a Judgment is ſigned, there may be Execution taken immediately upon it; and it is not neceſſary that the Plaintiff ſhould forbear to take out his Execution, until the Judgment be entred. *Mich. 1649. For it is a perfect Judgment of the Court before it is entred, for the entry of it, is the Act of the Clerk, and not of the Court; and it may be he may be dilatory in entring of it, to the prejudice of the Plaintiff.*

If the Plaintiff in a Writ of Error to reverſe a judgment be non-ſuit, yet the Defendant in the Writ ought not to take out Execution without a *Scire facias* firſt ſued out againſt the Plaintiff in the Writ of Error. 15. *Nov.* 1650. *B. S. Q. tamen. For it ſeems the Plaintiff ſhall not bring another Writ of Error to reverſe that Judgment, but that ſuch non-ſuite ſhall be peremptory unto him.*

If

If a Writ of Error be brought in the Exchequer Chamber, to reverſe a Judgment given in this Court, and the Judgment is affirmed there; yet that Court cannot make out Execution upon the Judgment affirmed, but it muſt be done in this Court where the Judgment was given. 18. *Nov.* 1650. *B. S.*

If Judgment be affirmed upon a Writ of Error in the Exchequer Chamber, no Execution ſhall go againſt the Bail in the Original Action for the Coſts tared occaſione dilationis Executionis. Per Magiſtrum Liveſay, & alios &c. Paſc. 21. Car. 2di. Regis.

If an Execution be returned, as executed, and filed, the party can never have another Execution upon that Judgment, upon which the Execution was grounded; for there can be but one Execution executed upon one Judgment: but if it be not returned and filed, he may have another Execution. 10. *Feb.* 1650. *B. S. For the returning and filing it, makes it to be an Execution Executed; but before it was returned and filed, it was but an Execution executory or in* fieri, *and there cannot be intended to have been any ſatisfaction made to the Plaintiff by vertuet hereof.*

If one have a Judgment given for him, and he doth afterwards bring an Action of Debt upon this Judgment, but doth not give any Declaration unto the Defendant; the Plaintiff may at any time within the ſpace of one year next after the Judgment given for him, take out Execution upon his Judgment. 1652. *B. S. For the bringing of an Action of Debt, doth not take away his Judgment, and his not proſecuting of his Action of Debt, doth preſume he will*

waive that Action, and reſort to his Execution upon the Judgment; but if he give a Declaration, it is otherwiſe, for then he ſhews that he intends to proceed upon his Action of Debt, and both waies he may not proceed.

Elegit.

Upon a *teſtatum*, an Elegit doth lye into the principality of *Wales*, or into the County Palatine of *Cheſter. Hill. 22. Car. B. r.*

Eſſoigne.

The Eſſoigne Roll in the Court of the Common Pleas, is a Record of the Court, and doth remain in the Cuſtody of the Clerk of the Eſſoigns. *Paſc. 23. Car. B. r. The Eſſoigne Roll is a Roll wherein is entred that the party was Eſſoigned to another day, for ſome excuſe that he could not then appear.*

If a Declaration be delivered to the Defendant after the Eſſoigne day, the Defendant is not bound to plead that Term; but may Emparle unto the next Term: 3. *July.* 1650. *B. S. For it is accounted for a Declaration of that Term, and not of the precedent Term.*

Exception.

The Councel at the Bar ought to take all their Exceptions to the Record at one time, or at leaſt before the Court have delivered any opinion in the cauſe. *Paſc. 23. Car. B. r. For the Court is not bound to hear any afterwards; for this would hinder diſpatch of Buſineſs.*

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A Negative expreſſion may be taken to inure to the [illegible] as an Exception doth. *Trin.* 23. *Car. B. r. For an Exception, but in its nature a denial of a matter taken to be good by the other party either in point of Law or pleading.*

Exceptio in non exceptis firmat regulam.

Eſtate.

No Eſtate can be limited to commence after a Fee ſimple, becauſe a Fee ſimple is the largeſt Eſtate that can be imagined in the eye of the Law, and ſhall not be ſuppoſed to have a poſſibility, to have an end or determination. *Trin.* 23. *Car. B. r.*

Such an Eſtate which is not ſetled at the time of the making of it, but doth depend as to the being of it upon another eſtate which is not certain, but may either take effect or not take effect, is a contingent Eſtate. *Trin.* 23. *Car. B. r. Becauſe it depends upon an incertainty; and may be or not be, according to the ſeveral event of things, touching that other eſtate upon which it depended.*

Enrollment.

An Enrollment of a Deed, is either an Enrollment of it by the Common Law, or an Enrollment of it according to the Statute of Enrollments. *Trin.* 23. *Car. B. r. Vide the Statute.*

If a Deed be Enrolled by the Statute, and the Enrollment of that Deed is to be be pleaded, it muſt be pleaded preciſely, that it was Enrolled according to the Statute. *Trin.* 23. *Car. B. r. That the Plea may*

be certain, and that it may appear whether the Statute was purſued as it ought to be.

The Enrolling of a Deed doth not make the Deed to be a Record, but by the Enrollment it doth only become a Deed Recorded. *Mich. 23. Car. B. r. For there is difference between matter of Record, and a thing Recorded to be kept in memory; for a record is the entry in Parchment of Judicial matters controverted in a Court of a Record, and whereof the Court takes notice, but an enrolment of a Deed, is but a private act of the parties concerned, of which the Court takes noe cogniſance at the time of the doing it, although the Court give way to it.*

If an Iſſue be, whether Enrollment or not Enrollment, this iſſue is tryable by a Jury, and not by the Enrollment: becauſe this iſſue concerns matter of Fact, which is tryable by a Jury, though the Enrollment be done by an Officer of the Court. *Mich. 23 Car. B r.*

Before the 20. year of Q. *Eliz.* it was not uſed to Endorſe the Enrollments of Deeds upon the back of them, as it is now uſed to be done. *Mich. 23. Car. B. r. But now it is conſtantly uſed, and to good purpoſe, in reſpect of the more eaſier and readier proof of the Enrolment upon any occaſion; for credit is given to that endorſement, without any further proof, as being made by a known Officer, and entruſted for that purpoſe.*

An Enrollment of a Deed ought to be made in Parchment and Recorded in Court. *Paſc. 24. Car. B. r. For perpetuities ſake.*

If the Inrollment of a Deed be loſt, yet the Enrollment is good evidence if it can be proved to a Jury by circumſtances, that there it was an Enrollment. *Paſc. 24. Car. B. r. For the loſs of a Record or Deed, is not the loſs of a mans title, if it may otherwiſe be proved.*

The

The Enrollment of a Deed is a ſufficient proof of the Deed it ſelf upon a tryal. *Mich.* 1650. *B. S. For every Deed before it is Enrolled, is to be ackyowledged to be the Deed of the party before a Maſter of the Chancery, if Enrolled in Chancery; or before a Judge of the Court where it is Enrolled.*

If Lands be conveyed in a Deed for mony only, then that Deed muſt be Enrolled, elſe the Lands will not paſs by the Deed, but if Lands be conveyed in a Deed, in conſideration of money paid, and alſo in conſideration of natural love and affection, there it is not neceſſary to Enrol the Deed, but the Lands will paſs, though the Deed be not Enrolled. 5. *Feb.* 1649. *Hill. B. S. For in the former caſe it is a meer Deed of Bargain and ſale, which paſſeth nothing without Enrollment; but in the latter caſe the Land may paſs by way of uſe.*

Eſcape.

If the Sheriff ſuffer one taken by him in Execution to Eſcape, the party, at whoſe Suite he was taken in Execution, may either have an *Alias Capias* againſt the party that Eſcaped, to take him again in Execution, or an Action upon the Caſe againſt the Sheriff that ſuffered him to Eſcape. *Mich.* 23. *Car. B.r. But if he be impriſoned upon the Execution, and after Eſcape, there lies not an* Alias Capias, *but only an Action againſt the Gaoler.*

An Eſcape in one place, is an Eſcape all *England* over. 6. *Nov.* 1650. *B. S. For if the priſoner be once at large, it ſhall be intended he may go whither he pleaſe.*

An Adminiſtrator may bring an Action of Eſcape,

for an Eſcape ſuffered of a priſoner of the Inteſtate in his life time. *Trin.* 23. *Car. B. r. To recover what the Inteſtate was damnified in his eſtate, by reaſon of the eſcape.*

An Eſcape in one place is an Eſcape in all places; for if a priſoner be once Eſcaped and at large, it ſhall be intended he is confined to no place, but may go at large where he pleaſeth; ſo that for an Eſcape, the party whoſe priſoner is Eſcaped, may bring an Action for this Eſcape in what County he pleaſeth, for the Action is not Local or fixt to any certain place. *Trin.* 24. *Car. B.r. But tranſitory, and may be laid in any place.*

Extent.

Lands in the hands of a Truſtee may be extended for a Debt due to the King. *Hill.* 23. *Car. B r. Q. Whether they are extendable for any other Debt, due to a common perſon.*

Eſcheator.

The King may by his ſpecial Commiſſion, make one or more Deputies Eſcheators, to find an Office, and this hath been uſed to be done after the death of a Noble man or other perſon of great quality. *Paſc.* 24. *Car. B.r. For the Eſcheators were not Officers for life, but put in every year by the Lord Treaſurer of* England.

Fine

Fine.

THe Court may ſet a Fine upon one that ſhall beat any of the Court, or the Jury impannelled to try a Cauſe there, or the Procurers. 27. *Aſſ.* 63. 44. 32. *H.* 6. *f.* 40.

A Fine for a licence of Alienation to alien Lands held in *Capite*, is to be paid in Chancery, for there is the pardon for Alienation of ſuch Lands without licence to be ſued forth. 21. *Car. B. r. And thence is the Writ granted, upon which the party hath leave to to alien ſuch Lands.*

If an Officer of this Court do not give his due attendance upon the Court, as his place requires, the Court may ſet a Fine upon him for his neglect. *Trin.* 22. *Car. B. r. For the Court hath the Governance of ſuch Officers, and is to puniſh miſdemeanours.*

This Court may ſet a Fine upon the Clerk of the peace, who returns an Endictment into this Court, upon a *Certiorari* directed to remove the Endictment into this Court, if the Endictment be not good in the matter of form. *Trin.* 22. *Car. B. r. For it ſhall be intended that it was his negligence, that the Endictment was not well drawn, for it ſhall not be preſumed that he can be ignorant in the form of drawing Endictments, and he is an Officer accomptable to this Court for things done in relation to his office.*

The Court cannot ſet a Fine upon a Sheriff that is out of his Office. *Mich.* 22. *Car. B. r. For then he ceaſes to be an Officer of the Court, and conſequently the Court cannot puniſh him as an Officer of the Court.*

If the Conuſee of a Fine levied of Lands, do pay mony unto the Conuſor of the Fine at the time of the Fine levyed,

levyed, and there is no uſe declared to lead the uſe of the Fine levied of theſe Lands; the Law will conſtrue the Fine to be levied of theſe Lands to the uſe of the Conuſee, to whom the Fine is levied; but if there be no money paid by the Conuſee, nor any uſe declared, the Fine ſhall enure to uſe of the Conuſor that levyed the Fine. *Paſc. 23. Car. B.r. For nothing appears, whereby it can be ſuppoſed that the parties had any intention, the Eſtate in the Lands ſhould be altered by the Fine, but that the Fine was levied in Corroberation only of the title of the Conuſor; but where money is paid, the Law will intend that he that paid it is to have benefit by the fine.*

If Juſtices of peace do proceed upon an Indictment, after a *Certiorari* out of this Court is delivered unto them, to remove the Endictment into this Court; This Court may ſet a fine upon them for their contempt to this Court, in not obeying the Proceſs thereof. *Hill. 23. Car. B. r. This was done heretofore in the caſe of Sir* John Sedley, *and Sir* Thomas Stile, *two Juſtices of the peace of the County of* Kent.

If a *Habeas Corpus* do iſſue out of this Court, and the party to whom it is directed do make an inſufficient return of it, this Court may ſet a Fine upon the party for making this inſufficient return. *Paſc. 24. Car. B.r. For it ſhall be accounted his negligence, or falſitie, that he makes not a good return.*

A Fine and recovery cannot deſtroy an eſtate executory, which depends upon contingencies; but it will deſtroy a Remainder. *Becauſe it is incertain whether there ſhall ever be ſuch an eſtate in eſſe for the Fine to work upon: but it ſeems it is not ſo of an Eſtate in Remainder. Q. Paſc. 24. Car. B. r.*

If

If part of a Fine that is ſet upon one that is convicted upon an Endictment, or information for an offence done by him contrary to a Statute, do belong to a ſubject, as it may if the Statute do ſo direct all the fine ſet upon the party, ought not to be eſtreated into the Exchequer. *Paſc.* 24. *Car. B.r. But the Kings part only ought to be eſtreated; for if it ſhould, this would put the Informer to trouble to get his part.*

A Fine *ſur Cogniſance de droyt, come ceo, que il ad, de lour done*, &c levied of Land, doth admit the poſſeſſion of the Lands, of which the Fine is levied to paſs by the Fine; for no man ſhall be preſumed to give an eſtate which he hath not: but a Fine *come droyt*, levyed of Lands, doth only paſs the right of the Conuſor in the Lands of which the Fine is levied. *Mich.* 1649. *B. S. For one may have a right, though he hath not the poſſeſſion.*

A Fine *ſur Cogniſance de droyt come ceo*, &c is a Feoffment upon Record of the Lands compriſed in the Fine, and doth imply a Livery and Seiſin to be made of thoſe Lands. *Hill.* 1649. 26. *Jan. B. S. To paſs the Eſtate out of the Conuſor to the Conuſee.*

A Fine of twenty nobles, was ſet upon one, for bringing an Attaint againſt a Jury, after the Jury had been formerly acquitted. *Hill.* 1649. 4. *Feb. B.S. For falſe vexation of the party.*

A Fine ſet upon one which is voidable, that is, may be avoided, is not void abſolutely, but continues to be a grod Fine, until it be avoided by the Plea of the party that is Fined. *Paſc.* 1650. 4. *Feb. B.S. Otherwiſe it is a Fine that is void.*

One may declare the uſe of a Fine by Paroll; and

and if there be ſuch a Declaration by Parol, made to lead the uſe of a Fine, and it be defective, to declare the intent of the parties, it may be afterwards ſupplyed and made good by ſubſequent Parolls. 8. *Nov.* 1650. *B.S. For the words are but to ſhew the intent of the party how he meant the Fine ſhould work, and is in affirmance of the Fine.*

Filing of Proceſs or other thing.

A *Capias* that is duly ſued forth, may be filed afterwards, and it is not neceſſary to file it at the time when it is taken forth. 21. *Car. B. r. For the Filing of it doth contribute nothing to the eſſence of the Writ; yet it ſeems fairer practice to file it preſently.*

A Declaration may be Filed in the Office after a Writ of Error is brought, and ſo is it of a Warrant of Atturney. *Paſc.* 24. *Car. B. r. For the Defendant is at no prejudice by the filing of them, and he did take notice of them, as appears by his pleading and going to iſſue with the Plaintiff; and the filing is not of the eſſence of the Declaration.*

Affidavits which are not read in Court, may not be filed there, until the Secondary hath made his report in the cauſe, touching which ſuch Affidavits were made, but if they be read in Court, they may be preſently filed. *Trin.* 24. *Car. B. r. For the Court takes no notice of them, until they be read in Court, or that they are taken notice of by the Secondary, upon examination of the matter referred.*

An Original Writ may be Filed after Judgment given in the cauſe, for which it is ſued forth; if it were ſued forth before the Judgment given. *Trin.* 1650. 26. *Junii. B.S. Elſe not.*

It

It is now uſed, that if a Rule be made upon the reading of Affidavits in Court, the Clyent ought not to have the Affidavits out of Court, but they ought to be filed, that Copies may be taken of them, if either party deſire it.

The Court will not compel the Plaintiff to file a *venire facias* after a Verdict, if the Venire will make an Error, for if there be no *venire*, that defect is helped by the Statute of *Jeofailes*, but if there be a *venire*, and that *venire* is erroneous; this is not helped by the Statute. *Trin.* 1651. *B. S. And therefore the party ſhall not be compelled to do a thing indifferent to be done or not to be done to his own prejudice.*

Falſe Latin and Form.

The Court doth uſe to amend falſe Latin and Form in Bills preſented unto them by the grand Enqueſts every Term by their licence and conſent; but the Court cannot amend matter of ſubſtance in them. *Mich.* 22. *Car. B.r. For that were to make new Bills; but the altring of them in the form only, alters not the ſubſtance of them.*

Forma Pauperis.

By *Wild* at the Bar, It was ſaid that none ought to be admitted to ſue in *forma pauperis* in an Action of the Caſe for words. Q. whether he meant to ſue, or to defend, or in neither caſe.

If one that is admitted to ſue in *forma pauperis* will not proceed according to the Rules of the Court, but uſeth delayes to vex his adverſary, the Court will

Diſpau-

Diſpauper him. *Mich.* 22. *Car. B. r. For the Law doth not favour the poor to do injury to others, but to help them to recover their right, where they want ability of themſelves to do it.*

If one that doth ſue in *forma pauperis*, be non-ſuite at the tryal, he muſt not pay coſts to the Defendant, but be whipped, or ſuffer ſuch puniſhment as the Court ſhall award. *Paſc.* 1652. *B.S. For the Law will Judge he had no cauſe of Action, and therefore he muſt make ſatisfaction to the Defendant for unjuſtly vexing of him in his perſon.*

If it be proved unto the Court, that one who ſues in *forma pauperis* is a vexatious perſon, and hath many frivolous Suites depending, the Court will Diſpauper him. 1654. *B.S. For this will be a means to make him leſs contentious, and the Law doth not favour unneceſſary and vexatious Suites.*

Rolle Chief Juſtice ſaid, That he did not uſe to admit any one generally to ſue in *forma pauperis*, that is to ſue in all Cauſes; but only to ſue ſo in one Cauſe by vertue of that admittance. 1654. *B. S. So that if he had other Cauſe to ſhew, he muſt petition again to be admitted to ſue in* forma pauperis, & ſic toties quoties,

Forfeiture.

If one take a Wife, that is Seiſed of Gavel kind Lands, and ſhe dyeth without iſſue by her husband, her husband ſhall be Tenant by the curteſie of half of the Lands ſo long as he ſhall live unmarried, but if he marry again he ſhall Forfeit his Eſtate in the Lands. *Mich.* 22. *Car. B.r. This is by the cuſtom of* Kent, *but by the ſame cuſtom, if he had iſſue by his wife,*

then

then he ſhall be Tenant by the curteſie of all the Lands his wife was ſeiſed of, and although he do marry again, he ſhall not Forfeite his eſtate. Mich. 22. Car. Q. *Whether in the former Caſe, he ſhall forfeit his Tenancy by the courteſie, if he do live incontinently, as the wife ſhall her Dower by a like cuſtome.*

If a Leaſe be ſo made, that it is to be Forfeited, if the Rent reſerved in the Leaſe be not paid, as the Leaſe doth provide; although the Rent be not paid accordingly, yet there is no Forfeiture to be taken, if there was not an actual and Legal demand of the Rent made by the Leſſor. *Mich. 23. Car. B.r. For the Law doth not favour defeating of eſtates; and it cannot elſe ſo well appear, that there was an actual failure of payment.*

If a Copy-holder do deny to pay unto the Lord the fine which is aſcertained due unto him by the Copy-holder, or do refuſe to appear at his Lords Court; and to do his Suite there; this is a Forfeiture of his Copy-hold eſtate. *Trin. 24. Car. B.r. For he holds his Copy-hold of the Lord upon theſe conditions implyed in Law.*

If a Copy-holder do let his Copy-hold unto another for years, and the Leſſee do ſell the Timber growing upon the Copy-hold, yet this is not a Forfeiture of the Copy-hold eſtate. 6. *Nov.* 1650. *B. S. Becauſe the Copy-holder himſelf did not do it; and he had power to let his Copy-hold for years, and ſo did no wrong.*

Franchiſe.

No Franchiſe ſhall be allowed in any caſe where the Franchiſe doth fail to adminiſter juſtice within the Franchiſe;

Franchiſe; but if there be ſuch a failer, this Court by their Authority may intermeddle (notwithſtanding the priviledges of the Franchiſe) to compel them to do Juſtice. *Mich.* 22. *Car. B.r. For priviledges are not granted to protect men in neglecting to do right, or to do wrong: and this Court is the ſuperintendent Court of the Nation, to ſee Juſtice equally diſtributed to all perſons.*

Fees.

In ſuch Caſes where the Sheriff is to have Fees, there he is not bound to execute his Office in returning of Writs, *&c.* until the Fees that are due unto him be tendred unto him. 22. *Car. B.r. For otherwiſe he muſt be put to trouble and charge to recover them, which the Law will prevent, in favouring him as being a publick Miniſter imployed in the Execution of Juſtice.*

The Statute of 23. *H.* 5. which doth give Fees to Sheriffs, doth only extend to their executing of Writs of Execution. 22. *Car. B.r. And not other Proceſſes.*

In the Caſe of *Hene* and *Nisbit. Paſc.* 1659. By *Glyn* Chief Juſtice, There are no Fees due to the Sheriff for executing an *Habere facias poſſeſſionem*, and ſo let it be declared, although they have uſually taken 2. *s.* 6. *d.* for executing ſuch Writ.

There are no Fees due to the Sheriff by the Common Law by the ſubject for executing his Office; but the King ought to pay him his Salary. *Mich.* 22. *Car. B.r. For as the people do owe Alleigance to their King, ſo the King doth owe Adminiſtration of Juſtice, and protection unto his people, and is bound to do it at his own charge.*

An

An Action of Debt doth lie for a Councellor or an Attorney for his Fees, againſt him that retained him in this cauſe. *Mich.* 22. *Car. B. r.* Q. *Whether it lye for a Councellour without a ſpecial retainer.*

If a Clyent, when his buſineſs in Court is diſpatched, doth refuſe to pay unto the Officer in Court, the Fees which are due to him for doing his buſineſs; the Court will upon motion grant an Attatchment to the Officer againſt the Clyent, to have him committed, untill he pay the Fees due. By *Rolle* Chief Juſtice. 1650. *For the not paying the Fees, is a contempt to the Court, and the Court is bound to protect their Officers in their rights.*

Felony.

Where one is doing of an unlawful act, and the death of any perſon enſueth upon the doing of that act, though the death of the party was not intended by him that did the Act, yet this is felony. *Paſc.* 23. *Car. B. r. For the Law will judge, that he that would do one unlawful Act, might have an intention to do any other unlawful act, which might be occaſioned upon the doing thereof.*

If one be committed to the Gaol for one Felony, the Juſtices of the Gaol delivery, may enquire and try him for another Felony for which he was not committed, by vertue of their Commiſſion. By *Bacon* Juſtice. *Trin.* 23. *Car. B. r.*

It is Felony to perſonate a Bail. By the Statute of *Jacob. Mich.* 22. *Car. B. r.* Q. *Whether the procuring of one to perſonate a Baile be Felony.*

The receiving only of ſtolen goods, is not Felony;

but the receiving of them, and comforting the Felon is Felony. *Paſc.* 24. *Car. B. r. For he may receive them, and not know them to be ſtolen, but the comforting the Felon, doth prove that he conſented to the Felony, and approved of the act, and a countenancer of it.*

If one be ſet upon in the High-way or other place to be robbed, and he do caſt away his goods with an intent to ſave them from the robber; and the robber doth take them up, and carry them away, this is a robbery and Felony committed to the perſon of the party robbed, although he took nothing from his perſon. *Mich.* 1649. B. S. *For the party is robbed of his goods, and the thief knew them to be the parties goods, and came with an intent to take them from him, had he not caſt them away, and was the cauſe that he caſt them away.*

One ought not to be arreſted upon ſuſpicion of Felony, except that there be good cauſe ſhewed for the ground of this ſuſpicion. 1649. *B. S. For every fooliſh fancy or conceit, is no ground of a ſuſpicion ſufficient to arreſt one for ſo good a crime; but there muſt be* probabilis cauſa *for the ſuſpicion.*

It is Felony to take a Bill from off the File, after a Verdict in the cauſe for which the Bill was ſued forth. *Mich.* 1649. *B. S. For this is embezeling of a Record.*

The robbery of a ſervant of his maſters money in his cuſtody, if it be in preſence of his maſter, is robbing of the maſter. *Mich.* 1649. *B. r. For it is all one as if the money were in the cuſtody; for the ſervant hath not the property in it in reſpect of his maſter.*

A rob-

A robbery ſhall be ſaid to be done in that Hundred where the party robbed is firſt ſet upon, although his goods be taken from him in another Hundred. *Mich.* 1649. *B. S. For there the robbery was begun, and the firſt broken, and the taking of the goods is but a continuation of the firſt action.*

A Hundred ſhall not be charged for a robbery committed within it upon the Statute of *Wincheſter* in *Crepuſculo* or twilight, that is, when it is neither perfect day nor perfect night; but if it be committed by day light, although it be before the riſing of the Sun, or after the ſetting of it, the Hundred ſhall be charged. 31. *Oct.* 1650. *B. S. For in the twilight the Felons cannot be well diſcovered.*

A Hundred ſhall not be charged for a robbery committed within it in the night, becauſe hue and cry cannot be made in the night, for that is a time for reſt. 1650. *B. S.*

If a robbery be begun in the day light, but is not ended till dark night, yet the Hundred where it was done is chargeable for it by the Statute of *Wincheſter.* 1650. *B. S. For it is accounted one continued act, and ſhall relate to the beginning of it.*

Fee ſimple.

A Feoffment made of Lands to one and his Heirs Males is a Fee ſimple. *Mich.* 23. *Car. B. S. For it is not an eſtate compriſed within the Statute of* Weſt. 2. De donis conditionalibus, *and before that Statute, there was no eſtates in tail, but ſuch eſtates were accompted limited or ceremonial Fee ſimple.*

False Imprisonment.

An Action of False Imprisonment, doth lie against a Baily, by the party that is Arrested by him, after the retorn of the Writ is past. *Hill.* 23. *Car. B.r. For this is all one, as if he were Arrested without a Writ, for by the retorn of the Writ, the Sheriffs and Bailiffs power are at an end, as to that Writ, and so they have no power by vertue thereof to Arrest the party.*

If a Process be unduly obtained, and the party against whom it is had, be thereupon taken and imprisoned, an Action of False Imprisonment doth lye by the party Imprisoned against him, at whose Suite, he is Imprisoned. *Mich.* 24. *Car. B.r. Because there was no lawful Authority to Imprison him.*

Feoffment.

A Feoffment made of Lands unto a Fem Covert is a good Feoffment in Law, until the husband do disagree to it; but if he disagree, it is not good, for the wife can neither give nor take without her Husbands consent. *Hill.* 23. *Car. B. r.* Q. *If the husband do not know of the Feoffment made, and after the Feoffment doth die; what the Feoffment shall operate.*

Foundation.

None hath power to found a free Chappel but the King. *Hill.* 23. *Car. B. r. For it is as much as to create a new Tenure.*

The Foundation of a thing may alter the Law, as touching that particular thing. *Hill.* 23. *Car. B.r. But not to a general prejudice.*

Fiction

Fiction of Law.

The Law ought not to be ſatisfied with Fictions, where it may be really ſatisfied. *Paſc.* 24. *Car. B. r. Yet in ſome Caſes Fictions of Law are neceſſary, and to be allowed.*

Gavel-kinde.

IF one take to Wife a Woman ſeiſed of Gavel-kind Lands, and the Wife dye without having had any iſſue of her body by her husband; yet the husband ſhall be Tenant by the courteſie of half of the Lands, during the time he continues unmarried. But if he marry he ſhall forfeit his Tenancy by the courteſie. But if he had iſſue by the wife, if the Wife dye he ſhall be Tenant by the Courteſie of the whole Land, and although he do marry, he ſhall not forfeit his Tenancy by the courteſie. *Mich.* 22. *Car. B. r.. This is by the cuſtom of* Kent. *Vid. tit. Forfeiture.* 222. 223.

Guardian.

A Guardian of an Infant may acknowledge ſatisfaction upon Record for a Debt, which he hath recovered at Law for the Infant. *Trin.* 23. *Car. B.r. But it muſt be a Guardian, that is aſſigned by the Court to ſue for the Infant. The act of ſuch a Guardian is adjudged the act of the Infant.*

The Court will aſſign a Guardian to an Infant to

ſue for him, if the Infant do come into the Court, and deſire it of the Court, and name the party he deſires to have for his Guardian, and produce him in Court. *Trin. 24. Car. B. r. And the Court will aſſign in ſome Caſes a Guardian for to defend a ſuit for an Infant at the prayer of the Plaintiffe.*

Good Behaviour.

If one do affront any Court of Juſtice, this is a good cauſe to bind the party to his Good Behaviour. *Paſc. 24. Car. B. r. For the affronting of juſtice, is a publick miſdemeancur, and not a private, although it be done, but to the perſon of one man, as to the Judge of a Court, a Juſtice of peace, &c. Becauſe ſuch perſons are publick Miniſters of Juſtice, and act for the Commonwealth.*

He that doth upon Articles ſworn in Court, deſire the party againſt whom the Articles are ſworn, may be bound thereupon to the Good Behaviour, muſt expreſs ſome ſpecial matter in thoſe Articles, for which he ought to be bound to the good behaviour. For if the Articles be only general, the good behaviour is not to be granted upon them. *Mich. 22 Car. B. r. For a general accuſation is no accuſation for the incertainty of it, and the party cannot tell what anſwer to make to ſuch a general accuſation.*

Perjury is not an offence, for which the party perjured may be bound to the Good behaviour, becauſe it is not a general misbehaviour. *Mich. 22. Car. B. r. But the party may be Endicted for it, and fined, if he be thereupon convicted.*

One was bound to his Good behaviour, for affrighting people in the night in their houſes, by ſhooting

ſhooting off of Muskets, and for the aſſaulting of one going in the high way. *Mich.* 22. *Car. B. r. For this was accompted more than a particular breach of the peace.*

A woman that is a common ſcold may be bound unto the Good behaviour. *Mich.* 22. *Car. B. r. For ſhe is a common diſturber of the publick peace.*

The Good behaviour was granted againſt one upon an Article ſworn againſt him, that he had maliciouſly pulled down a piece of anothers houſe. *Hill.* 22. *Car. B. r. For this is a riotous act, and a high breach of the peace, which concerned the publick.*

A Juſtice of peace ought not to bind any perſon to the Good behaviour, upon a general accuſation made againſt the party. *Paſc.* 23. *Car. B. r. Vid. ſupra.*

One was bound to his Good behaviour, for ſtopping of a Conſtable from making a purſuit after a felon. *Trin.* 23. *Car. B. r. For this is a publick offence againſt the Common-wealth.*

The Good behaviour is not to be granted againſt one, for ſpeaking of words only againſt one perſon: but it may be granted againſt one, for ſpeaking of words againſt divers perſons at ſeveral times. *Hill.* 23. *Car. B. r. For that is a general misbehaviour, but the other is but a particular misbehaviour.*

The Good behaviour was granted againſt one, upon an Article ſworn and read againſt him, that he ſaid that he would burn down another mans houſe. *Hill.* 1649. *B. S. For a man ſhall be judged in many caſes by his words, though no Actions accompany.*

Heire.

THe word Heir is *nomen collectivum*, and extends unto all Heirs. *Trin* 23. *Car. B. r.*

The Heir is favoured at the Common Law, for at the Common Law the Anceſtor could not convey away his Lands, from his Heir at Law, upon his death bed, without the conſent of the Heir. *But now by the Statute of* 32. *H.* 8. *the Law is altered in that point. Hill.* 23 *Car. B. r. The Law is the preſerver of Inheritances.*

Heriott.

A Heriott is the fruit of a Rent-ſervice. *Hill.* 21. *Car. B. r. This is to be meant of Heriot ſervice, and not of Heriot Cuſtom.*

Habeas Corpus.

NO Habeas Corpus ſhall be made out in the vacation time, to remove a cauſe out of an inferior Court other than the Court in London, Middleſex, or the Marſhalſey; or other Courts within 5. miles of London returnable immediate; but at a day certain in Court: and that every ſuch Habeas Corpus returnable in Trin. or Hill. Term, be not returnable after the ſecond return of the Term. Per Magiſtrum Liveſay, & alios Paſc. 21. Car. 2di. Regis.

If a Priſoner appear in Court, upon a return of a *Habeas Corpus* to remove him hither; and there doth appear

appear by the retorn, that there was good cauſe to commit the priſoner to priſon, and to detain him there, the Court will remand or ſend him back to the place where he was firſt committed; but if upon the retorn, it doth appear that there was no lawful cauſe to commit him, then the Court will diſcharge the priſoner: but if it be doubtful to the Court, whether he was lawfully committed or not, then the Court will bail the priſoner, until the matter do appear whether there was cauſe or not. *Hill.* 21. *Car. B. r. Trin.* 23. *Car. B. r.*

If a Cauſe be removed in the vacation out of London, Middleſex, or the Marſhalſey, or other Courts within five miles of London by Habeas Corpus retornable immediate, and Bail put in as of the firſt retorn of the next Term, if the Declaration be delivered eight dayes before the end of the Term, then the Defendant is to plead to anſwer: and in Mich. Term, if it be delivered before the retorn day of Craſtin. Anim. And in Eaſter Term, before Menſ. Paſc. then the Defendant is to plead to tryal the ſame Term. Per Magiſtrum Liveſey, & alios. Paſc. 21. Car. 2di. Regis.

A *Habeas Corpus ad reſpondendum*, is when any one is impriſoned, at the ſuit of another upon a legal proceſs, in the Fleet or any other priſon, except the Kings Bench priſon, and a third perſon would ſue that priſoner in this Court, and cannot, becauſe he is not in cuſtody of the Mareſchal of this Court, there he may have a *Habeas Corpus*, to remove the priſoner out of the priſon where he is, into this Court, to anſwer

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ſwer unto his Action here. 21. *Car. B. r. And for that cauſe it is called* Habeas corpus ad reſpondendum; *becauſe he it to anſwer the parties Action.*

A *Habeas Corpus cum Cauſa*, doth remove the body of the party for whom it is granted, and all the Cauſes which are then depending againſt him. 21. *Car. B. r. And for that reaſon it is called a* Habeas Corpus cum Cauſa, *the body with the cauſe, which is* nomen collectivum, *and implies all cauſes.*

1. 1 Mod. 234. 2 Mod. 198. A *Habeas Corpus* is either *ad ſubjiciendum*, granted on the Crown ſide: Or, *ad reſpondendum*, granted on the Plea ſide. *Ad ſubjiciendum*, to ſubmit to the Order of the Court in Criminal matters *ad reſpondendum*, as aboveſaid.

The Court will not grant a *Habeas Corpus*, retornable *immediate*; but in ſome Caſes they will give but a ſhort time to retorn it. *Trin.* 23. *Car. B. r. For though the Law doth favour liberty, yet it allows convenient time for doing of things.*

But it is in the diſcretion of the Court to do it, and in the Caſe of one *Sadler. Mich.* 21. *Car.* 2. *Reg.* The Court granted a *Pluries Habeas Corpus* with a penalty of 100. *l.* retornable *immediate.*

After the retorn of a *Habeas Corpus* is read and filed in Court, it cannot be amended. *Trin.* 23. *Car. B. r. For it is then a Record of the Court.*

None ought to take out a *Habeas Corpus* for a Priſoner without his conſent. *Trin.* 23. *Car. B. r. This holds not in all Caſes, for one may take out an* Habeas Corpus *without his conſent, to charge him with an Action.*

A *Habeas Corpus* to remove one that was committed for debt, from one priſon to another, may be granted, retornable *immediate*, or rather *in dilate*:

for

for this is only a *Habeas Corpus ad recipiendum*, in the nature of it.

A *Habeas Corpus* was granted out of this Court, directed to the Serjeant at Arms of the Houſe of Commons in Parliament, for a priſoner committed unto him by a Committee of the Houſe of Commons. *Mich.* 23. *Car. B. r.*

A *Habeas Corpus* was denied for a priſoner to have him for a Witneſs at *Worceſter* Aſſizes by the Court. *Trin.* 1657.

A Judge of this Court will not grant a *Habeas Corpus* in the Vacation, for a priſoner to follow his ſuit; but the Court may grant a ſpecial *Habeas Corpus* for a priſoner to be at his tryal in the vacation time. *Paſc.* 1650. 24. *Maii. B.S. For this may concern him more than the other can.*

The Court will grant a *Habeas Corpus* to one, to have a priſoner out of priſon to be a witneſs for him at a tryal, but at the charge of him that deſires the *Habeas Corpus*, and at his peril, to take care that the priſoner do not make an eſcape. 29. *Junii.* 1640. *Trin. B.S.*

By *Newdigate* Juſtice. *Trin.* 1659. If a *Habeas Corpus* be granted, to give liberty to a priſoner that lyes in priſon upon an Execution longer than for one day, this is not according to Law.

The Court uſeth not to put the reaſon into a *Habeas Corpus*, why they ſend for the priſoner; for it may be for Treaſon, or great Conſpiracy. *By* Cacline *Juſtice.*

Habere

Habere facias poſſeſſionem:

One may have a new Writ of *Habere facias poſſeſſionem*, if a former Writ of *Habere facias poſſeſſionem* in the ſame Cauſe be not well executed or retorned. *Mich.* 22. *Car. B.r. For that is all one as if ſuch Writ had never been taken out; becauſe the party hath no fruit or benefit by it.*

Homage.

When livery is granted to the Heir at full age, of the Lands for which he was in ward to the King during his nonage, and which were by reaſon thereof in the Kings hand: his homage which he ſhould do to the King (by reaſon of his tenure) at the time when the livery is ſued forth, is reſpited for a certain ſum of money, to be paid yearly to the King by the heir, until the heir ſhall do his homage, and theſe monies are called reſpite of Homage: becauſe by reaſon of ſuch monies the Homage is reſpited, or put off from year to year. 1655. *B.S. This learning is now out of doors by the taking of tenures in* Capite *away.*

Hundred.

If a robbery be begun in the Hundred of *Dale*, and ended in the Hundred of *Sale*; the Hundred of *Dale* is chargeable for this robbery, upon the Statute of *Winchester.* 1655. *B. S.* Q. *For it ſeems both ſhould be chargeable.* vid. *tit. Felony.*

Jury.

Jury.

BY *Glyn Chief Juſtice.* This Court will not order the Secndary to return a Jury to try a Cauſe at the Aſſizes, except both parties conſent; for this were to thwart the ordinary courſe of proceedings. *But in Cauſes that are to be tryed at the Barr, the Court will upon good cauſe ſhewed by either party why it ſhould be ſo, will order the Secondary to do it.*

It was ſaid by *Glyn* Chief Juſtice. *Mich.* 1658. *That the Court may direct the order of ſwearing of the Jury upon a tryal at the Bar, contrary to that order that the Jurors are retorned in the Panel.* Nota: *for it is very rarely done.*

The Court was moved, that a Jury of Merchants might be retorned, to try an iſſue between two Merchants, touching Merchants affairs, and it was granted. *Hill.* 21. *Car. B. r. Becauſe it was conceived, they might have better knowledge of the matters in difference which was to be tryed, than others could who were not of that profeſſion.*

A Jury may find a thing which is not given unto them in evidence, if they do know it of their own knowledge. *Mich.* 22. *Car. B.r. For they may enform themſelves of the truth of the fact they are to try, by all poſſible and lawful means they can, and are not ſolely tyed to the evidence given at the barr.*

A Jury may take notice of a matter of Record, but they cannot try it. *Mich.* 22. *Car. B. r. For a Record muſt be tryed by it ſelf, and judged of by the Court.*

In

In every Caſe where there is to be a ſpecial Jury retorned, there ought to be a ſpecial Writ of *Venire facias* to ſummon that Jury. *Mich.* 22. *Car. B. r.*

If more than twelve men be retorned upon a Jury, and do appear, the firſt twelve that ſtand in the panel, are to be ſworn, and to try the Cauſe. This is the uſual courſe; *ſed Q.* Whether it be of neceſſity it ſhould be ſo, ſince they are all ſuppoſed to be indifferently retorned. *Paſc.* 23. *Car. B. S. This is true if none of them be challenged: but if ſome of them be challenged, and the challenge is alſo made good againſt them, then ſo many more of thoſe that remained above the number of twelve, ſhall be taken in, in order as they are ranked in the panell, to fill up the number that wanteth, to make it a full Jury.*

If a Juror do inhabit in a houſe that is in the Pariſh of *Dale*, and do occupy Lands that do lie in the Pariſh of *Sale* next adjoyning, and he is retorned upon a Jury as of the Pariſh of *Sale*, this is well enough although he do not dwell in *Sale. Paſc.* 23. *Car. B. r. For he ſhall be ſaid to be as well of the Pariſh where the Lands lie which he occupyeth, as of the Pariſh where he inhabits: for he is a pariſhioner in* Sale, *though an inhabitant in* Dale, *and he may as well be ſaid of* Sale *as of* Dale.

If more than twelve men do appear at a tryal, after twelve of them are ſworn, the reſt that are unſworn, muſt not continue upon the ſtand with thoſe that are ſworn, but muſt depart. *Paſc.* 23. *Car. B. r. That they may not be hindred in attending to the evidence, or any thing ſpoken to them privately, to ſway them further than the evidence will direct.*

The

The Court may give the Jury leave to drink at the Bar, after the evidence is given to them, and before the verdict, if the Plaintiff and Defendant will conſent unto it. *Paſc. 23. Car. B.r. But they may not drink out of the Court. A Jury had leave to drink at the Bar, after a long evidence given, in a very hot day, in Eaſter Term above-ſaid, by the conſent of the Plaintiff and Defendant.*

In Caſes, where it is conceived an indifferent Jury will not be retorned between the parties by the Sheriff of the County where the venue lies, the Court upon motion, will order the Sheriff to attend the Secondary of the Office with his Book of the Freeholders of the County where he is Sheriff, that he may ſee an indifferent Jury retorned. *Trin. 23. Car. B.r. But there may be probable matter ſhewed to the Court why an indifferent Jury may not be had, elſe the Court will make no ſuch Rule.*

A Jury cannot try a Conſideration to ground an Aſſumpſit upon, if the Conſideration was given or acted out of that County where the action is tryed. *Trin. 23. Car. B.r. For this were to try a matter of Fact, whereof they have no conuſance.*

Upon a motion and an Affidavit made in Court, that the Cauſe to be tryed at the barr, is a Cauſe of very great conſequence, the Court will make a Rule for the Sheriff to retorn 48. Jurors upon the Jury. *Trin. 23. Car. B. r. That each party may have liberty of challeng, and yet a ſufficient Jury rem in.*

A Tenant that is within the diſtreſs of a Lord of a Mannor or Leete, ought not to ſerve upon a Jury, in a Cauſe that concerns the Lord. *Mich. 23. Car. B.r. For it ſhall be preſumed, he may not be indifferent, in*

regard

regard of fearing to diſpleaſe his Lord, under whoſe diſtreſs he lies.

After a Juror is ſworn, he may not go from the bar, until the evidence be given, and the directions of the Court, for any Cauſe whatſoever, without leave of the Court: and although he have leave, he muſt have a keeper with him. *So cautious is the Court to prevent all ſuſpicion of ſiniſter proceedings in the tryal of Cauſes. Paſc. 24. Car. B. r.*

If a Juror be challenged, and the challenge entred by the Secondary, that Juror cannot be after that ſworn as a Jury man, to try that Cauſe wherein he was challenged, *viz.* at that tryal; although the party will waive his challenge, if there be Jury men enough beſides to try the Cauſe; but if there be not, then the cauſe of challenge muſt be ſhewed, and tryed, and if it be found no good challenge, he may be ſworn. *Paſc. 24. Car. B. r. Q. Whether before the challenge entred, he may be ſworn.*

Where a tryal is to be, for a thing that concerns the Under-Sheriff, there the High-Sheriff ſhall retorne the Jury. *Trin. 24. Car. B. r. For here ſhall be no favour ſuppoſed; but if the tryal concern the High-Sheriff, the Under-Sheriff ſhall not retorne the Jury, for there may be preſumed to be favour: for the ſervant depends upon the maſter, and not the maſter upon the ſervant.* Q. tamen: *for the maſter may favour his ſervant.*

The Jury ought not to have any writing with them when they go from the Barr, which hath not been proved, although ſuch a writing hath been given in evidence unto them. *For though it be given in evidence, yet if it be not proved, nothing can be directly concluded from it, and therefore the*

Jury

Jury is not to have it to guide their Conſciences by. Mich. 24. *Car. B. r.*

The Jury may find matter of Record, if they do know it of their own knowledge. *For example, if the Jury do know that* John Stile *levied a fine of his Lands in* Dale *to* I. N. *they may find it that ſuch a fine was levied. Paſc.* 1650. *B. S.* 10. *Marii. For a mans own knowledge is more certain than any evidence can be given.*

There are three grand-Juries retorned every Term to ſerve in this Court, every Jury conſiſting of 16, 17, 18, 19, or 20. Jurors, or more, to enquire of Offences Criminal committed in the ſeveral parts of the County of *Middleſex* through the whole County. *The reaſon why there are three Juries is, becauſe there are three Hundreds in* Middleſex, *and for every ſeveral Hundred, there is a particular Jury returned to ſerve for that Hundred only.*

Though a man be very aged, yet if he be an of an able body, and not infirm, he is not to be excuſed from ſerving upon the grand Jury.

One *Butler*, a man of 72. years of age, was denyed by *Rolle* Chief Juſtice, to be excuſed to ſerve, becauſe he was of an able body, and had his ſenſes and underſtanding perfect. *Hill.* 1651. *B. S.*

One that hath no Freehold in the County, or is a Conſtable, or a Surveyor of the high-way, is not thereby to be excuſed from ſerving upon the grand Jury. *For ſmall excuſes muſt not ſerve to protect men from ſerving the publick, which is to be preferred above any private intereſt. Paſc.* 1641. *B. S. By* Rolle *Chief Juſtice.*

The Jurors that appear at a tryal, ſhall not have their charges allowed them, if the Cauſe be not tryed,

for want of Jurors. *Paſc.* 1652. *B.S. For their appearance is of no benefit to any body; and therefore it is no reaſon they ſhould receive any recompence.*

When a Juror is withdrawn, he is ſtrook out of the panel by the Secondary.

Upon a general iſſue, the Jury may find a Record, but not upon a nul tyell Record. *Pleaded* 1651. *For there the Record muſt be tryed by it ſelf.*

If but eleven of the Jury be ſworn, if the twelfth man do ſtand by, and hear all the evidence that was given to his fellows, he may be ſworn afterwards, and paſs upon the tryal. *By* Rolle *Chief Juſtice.* 1654. Paſc. B. S. *For the Jurors are ſworn to try the iſſue, upon the evidence they ſhall hear; ſo that it ſeems in favour of tryals, the time of the Jurors being ſworn is not material, whether before or after the evidence.* Q. tamen, *for this is very rarely done.*

The Jury may take Depoſitions taken in Chancery, and exemplified there, given in evidence to them, from the Barr with them: but if they be not exemplified, they may only look upon them in Court, but not take them with them out of the Court. 1654. *B.S. For to ſee them, is no more than to hear them read, and they are not ſo authentical if not exemplified.*

Iſſue.

In the Caſe of *Wood* and *Fetherſton. Trin.* 1657. It was ſaid by the Court. That if the Defendant doth plead, and the Plaintiff replies and denies the Plea, the Defendant ought to make up the iſſue; for by the replication and denial of the Plea, a new iſſue is tendred by the Plaintiff.

Every

Every Iſſue is to be joyned in ſuch a Court that hath power to try it, otherwiſe the iſſue is not well joyned. 21. *Car. B. r. For if the Cauſe cannot be tryed the iſſue is fruitleſs, and if it be tryed, the tryal is* coram non Judice, *and ſo no good judgment can be had upon it.*

If an Action of Treſpaſs be brought againſt two for entring into the Plaintiffs Land, and one of them pleads that the Land is his freehold, and the other that he entred into the Land by the commandment of him that pleads it is his freehold, here is to be but one iſſue joyned. 21. *Car. B. r. For but one of the Defendants claimes an intereſt in the Land, and the other juſtifies but as a ſervant unto him, and if the tryal paſs for him that claimes the intereſt, there is no colour of Action to be maintained againſt the other, and if the iſſue be the found againſt the Defendants, they ſhall be found guilty of a joynt treſpaſs, for which there needs but one iſſue to be joyned.*

If the Defendant pleads to iſſue, and the Plaintiff neglect to enter it the ſame Term Iſſue is joyned, the Defendant within the firſt five daies of the next Term may alter his Plea, and plead de novo any other Plea what he pleaſeth. Per Magiſtrum Liveſay, & alios &c. Paſc. 21. Car. 2di. Reg.

If there be a Demurrer to an evidence, and the party whoſe evidence is demurred unto do plead to the demurrer, and joyn Iſſue with the Defendant upon it, this Iſſue muſt not be joyned upon a matter in fact in the evidence, but all the matters of fact given in evidence muſt be agreed, or elſe the Iſſue

is not well joyned; for the Court are not to try matter of fact, for that would be for them to give a verdict. *Mich.* 22. *Car. B. r. Whereas the Court are only to declare the Law, whether admitting that all the matter given in evidence by the Plaintiff be true, it doth prove the iſſue in queſtion or not, which they cannot do, except all the matters in fact be agreed to be ſo as they were given in evidence.*

By the Rules of the Court, if the Plaintiff will not try his iſſue after it is joyned, in ſuch time as he ought by the courſe of the Court to do, the Defendant may try it by Proviſo if he will. *Hill.* 22. *Car. B. r. That he may free himſelf (if he can) of the danger and trouble he may be ſubject to, by the depending of the Action brought againſt him, and to recover his Coſts for his unjuſt vexation. This is given by the Statute.*

A Judgment may be entred as to one part of an Iſſue, and a *nolle proſequi* to another part of the ſame Iſſue. *Paſc.* 23. *Car. B. r. This is only where the Iſſue may be divided. A* nolle proſequi *is, when the Plaintiff cauſes it to be entred upon the Roll that he will proſecute no further, and is as much as to ſay in Latin* nolo proſequi.

Where there is a Demurrer to one part of an Iſſue, and the other part of it remains to be tryed by a Jury, the Tryal of it may to be either before, or after the arguing of the Demurrer at the Election of the Plaintiff. *Paſc.* 23. *Car. B. r. For the Demurrer and the Iſſue have no dependency one upon the other; for one part concerns matter in fact, and the other matter in Law.*

Every iſſue ought to be joyned upon the moſt material thing in the Cauſe depending, that all the matter

matter in queſtion between the parties, may be tried: *Hill.* 23. *Car. B.r. For elſe the trial will prove to little purpoſe; becauſe the matter in queſtion will reſt undetermined.*

If an Iſſue be once joyned between the parties, this iſſue cannot afterwards be waved, if it be a good Iſſue, except both parties do conſent unto it, although the Iſſue be but in paper, and not engroſſed in parchment. *Trin.* 24. *Car. B.r. Therefore it is good to be well adviſed before the Iſſue be joyned.* ſed Q.

The place ought not to be made part of the Iſſue in a tranſitory action. *Trin.* 24. *Car. B.r. For the place is not material, as it is in a real and mixt Action: for in a tranſitory action, it matters not where the party layes the cauſe of action to be.*

An immaterial Iſſue joyned, which will not bring the matter in queſtion to be tried is not helped after Verdict, by the Statute of *Jeofailes*, but there muſt be a Repleader, but an unformal Iſſue is aided by the Statute, and ſo it was adjudged. *Mich.* 18. *Car.* 2*di. Reg. in B.r. Inter* Walſingham & Combe. *Intra Trin.* 17. *Car. Rot.* 1575. 26. *Jan. Hill.* 1649. *Paſc.* 1650. 4. *Maii. B.S. For this is matter of ſubſtance; for if there was no Iſſue, there could be no Verdict, and ſo it is, as if nothing were done in the Cauſe; and therefore there muſt be a new pleading to bring the matter in queſtion to an Iſſue.*

If there be two Iſſues joyned in one cauſe, and one of them is a good Iſſue, and well joyned, and the other is not a good Iſſue, but ill joyned, and upontryal of the cauſe, entire Dammages are given upon both the Iſſues, this is erroneous. 31. *Jan.* 1649. *Hill. B. S. For here are Dammages given, for a*

matter, which is not rightly tryed for want of joyning a good Iſſue to bring it in queſtion, and ſo the dammages being entire for both Iſſues, that which is well tryed is vitiated, and the verdict to no effect as to it.

An affirmative on the one part, and a negative on the other part, although it be but an implied negative, do make a good Iſſue. 15. *Maii Paſc.* 1650. *B.S. For an implyed negative, doth deny what is affirmed, although not ſo plainly, as an expreſs negative doth, and ſo there is a negative, and an affirmative to make an Iſſue.*

When a Plea is pleaded to the Plaintiffs Declaration, and the Plaintiffs Attorneys hand, is ſet to this Plea, then the Iſſue is joyned betwixt the Plaintiff, and Defendant, and not before. 6. *Feb.* 1650. *B.S. For then both parties are agreed of the matter in queſtion betwixt them.*

By *Glyn* Chief Juſtice. *Hill.* 1655. It hath been held to plead *non eſt factum*, is a general Iſſue in an Action of Covenant. &.

Judgment.

It was ſaid, *Paſc.* 1657. *B. S.* By *Herne* Secondary and *Tho. Jekell* an ancient Clerk of this Court, That a Judgement upon a *nihil dicit*, ought not to be entred by the Rules of the Court, until two Rules have been given in the Office for the Defendant to plead.

An erroneous Judgment in Chancery is reverſable in the Kings Bench. *Dyer.* 315.

Upon a Recovery in any Action, where the Plaintiff doth declare for a thing done, *vi & armis*; the Judgment ought to be entred with a *Capiatur* for a Fine

Fine for the King; but in an Action upon the Caſe, where the Plaintiff is not to declare with a *vi & armis*, there the Judgement againſt the Defendant ought to be, that he be *in miſericordia*. 21. *Car. B.r. The Capiatur which is impriſonment of the Party, and the Fine for the King, are for the breach of the Publick Peace, which every Action* vi & armis, *doth imply: But Treſpaſſes on the Caſe do not ſo, and therefore there the Party is only to be amerced, and not to be impriſoned or fined, and this is the reaſon of the different entry of the Judgments.*

A man is to have Judgment by this Court, to loſe his hand, Lands, and goods, and perpetual impriſonment, for endeavouring to ſtrike a Judge ſitting in Judgment, or ſtriking a Juror in the preſence of the Judge, or for ſtriking in *Weſtminſter* Hall ſitting the Courts. 22. *Ed.* 3. 13. *Fitz. Judgment.* 174. *Stamf.* 38. *So is it of one that reſcueth ſuch an offender.* 22. *Ed.* 3. *Aſſ.* 25.

Where there are ſeveral Judgments againſt the defendant, one of thoſe Judgments may be reverſed as erroneous, and yet the other Judgments ſtand in force. 21. *Car. B.r. This is meant where there are ſeveral diſtinct Judgments entred upon Record.*

All erroneous Judgment given by the Judges of Aſſize is reverſable in this Court. *Dyer* 250.

All Judgments, given in any Court of Record, ought to be entred in Latin: And if they be in Engliſh they are reverſable by a Writ of Error. 21. *Car. B. r.*

No Councel ought, by the Rules of the Court, to move any thing in arreſt of Judgment, except the Roll, wherein the Judgment is entred, or the *Poſtea* be in Court. 22. *Car. B. r. That the Court*

may be ſatisfied, that the matter moved, in arreſt of Judgment, is truly recited from the Record; for the Court will not rely upon the allegation of Councel at the Bar.

There is difference between a cuſtomary Judgment, and a Judgment given, according to the Common Law. *Trin. 22. Car. B.r. A Cuſtomary Judgment is a Judgment given within ſome particular Juriſdiction by vertue of ſome Cuſtom uſed there.*

It is ſufficient matter for the Defendant to move, in Arreſt of Judgment, to prove that he had not ſufficient notice given unto him of the tryal, before the tryal, according to the Courſe of the Court. *22. Car. B.r. Hill.* Viz. *to ſtop that Judgment, and to obtain a Rule for a new tryal upon the old pleadings.*

If a Judgment be given which is erroneous, and the Plaintiff do take out a *Scire facias*, upon that Judgment, and have a Judgment upon that *Scire facias*: the Judgment upon that *Scire facias* is erroneous alſo. *Mich. 22. Car. B. r. For if the foundation be naught, that which is built upon it, muſt needs fall, and here the firſt Judgment is the ground of the ſecond, which being erroneous, the ſecond cannot be good.*

A Judgment which is given, contrary to the Verdict, which was found in the Cauſe, is a void Judgment. *Mich. 22. Car. B.r. For the Judgment is to be warranted by the Verdict, and is but the affirmance of the Verdict, and therefore it muſt not contradict the Verdict, but concurr with it in all things.*

The Court will not reverſe a Judgment, which is given upon a *Nihil dicit*, and by the Rules of the Court, upon a motion, although the Plaintiff and Defendant do deſire it, but by the Conſent of the

Plaintiff and the Defendant, the Court will grant a Repleader in the Caſe. *Mich.* 22. *Car. B. r. That the matter in queſtion may come to be tryed; which by the Judgment upon the* Nihil dicit *was never tryed.*

If a Verdict be given after the Term, no Judgement can be given upon that Verdict, until the next Term following. *Mich.* 22. *Car. B. r.* 23. *Car. B. r. For ſuch proceedings in the Law, ought not to be in the Vacation time, but in Term time; for the Judgment is the Act of the Court, and the Court ſits not, but in Term.*

If a Judgment be obtained, but the Plaintiff doth take out no Execution upon this Judgment, in a year and a day next after the Judgment given: The Plaintiff cannot then take out Execution, until he hath revived this Judgment by a *Scire facias*, which *Scire facias* is to give notice to the Defendant to ſhew cauſe why the Plaintiff ſhould not take out Execution upon the Judgment, which Writ he may have without motion, by the Courſe of practice of the Court; but if there be a Judgment above ten years old, upon which no Execution hath been taken out, ſuch a Judgment cannot be revived by a *Scire facias*, without a motion and leave of the Court, that the Court may thereby be put in mind of what was formerly done. *Mich.* 22. *Car. B. r. But the Court doth not uſe to deny a* Scire facias *in ſuch a caſe.*

If the Defendants Attorney do enter a Plea for his Clyent in the Office, the Plaintiffs Attorney cannot enter a Judgment againſt the Defendant upon a *Nihil dicit*, or for want of a Plea, although the Plea be not given unto him by the Defendants Attorney.

torney. *Mich.* 22. *Car. B. r.* and *Paſc.* 24. *Car. B. r. For the Office is the place where the Attorneys on both ſides are to inform themſelves of the proceedings in their Clyents Cauſes; and the delivery of Declarations and Pleas, &c. by one Attorney to another in their Clyents Cauſes, is rather matter of courteſie and civility, than of any neceſſity or duty; yet it is the uſual practice to do it, and very rarely omitted.*

Four days after the Plaintiffs Attorney doth bring the *Poſtea* into the Court, if the Rule for Judgment is out, he may enter Judgment for his Clyent by the courſe of the Court, *Mich.* 22. *Car. B.r. Except the Defendant do then, or before, move ſomething to the Court to arreſt of, or to ſtay Judgment, but no Judgment ought to be entred before a Rule be given upon a verdict, and ſuch Rule out, but upon a* non prof. *there is no need of any Rule.*

Where a Judgement is arreſted only for miſpleading, there the Court will grant a Repleader. *Mich.* 22. *Car. B. r. To the end a good Judgment may be given, which cannot be upon an ill Pleading.*

A Judgment was reverſed in this Court, for tautology uſed in it, *Mich.* 22. *Car. B.r. That is, for repeating the ſame thing over and over. For the Law will not ſuffer Barbariſmes in the proceedings thereof; for they will in the concluſion bring all things into confuſion.*

If a Judgment be unduly obtained, and ſufficient proof thereof be made unto the Court, the Court will vacate the Judgment, and reſtore the party damnified by it, to be in the ſame condition that he was in before the Judgment. *Mich.* 22. *Car. B.r. Without putting him to a Writ of Error.* Paſc. 22. Car.

Car. B.r. *For the Court will not be made a ſtale to do any perſon injury, and the Court will alſo puniſh the party that uſed the falſity to obtain it.*

It one will take advantage of a Defeaſance of a Judgment, to avoid the Judgment, whereupon it was made, he muſt plead this Defeaſance in Court, otherwiſe the Court cannot take notice of it. *Mich. 22. Car. B.r. For the Defeaſance is a private thing between the Parties, and no part of the Record; but by pleading it, it becomes a matter of Record of which the Court may take notice.*

A Judgment in an Action of Detinue, is given conditionally, that is to ſay, that the Plaintiff recover the thing it ſelf, which is detained, if it may be had, but if it may not be had, that then he recover Dammages for the thing. *Hill. 22. Car. B.r.* viz. *Dammages to the full value of the thing it ſelf, and alſo for the Detaining of it, if there be any ſuch Dammage.*

Whereſoever the Defendant is upon the Judgment to be fined to the King, there the Judgment is to be with a *Capiatur*, but where he is not to be fined, there the Judgement ſhall be, that the Defendant be *in Miſericordia. Hill. 22. Car. B. r. The* Capiatur *is to take the party, and to impriſon him till he pay the fine. To be* in Miſericordia, *is to be amerced in his goods for the injury done againſt Law to the party at whoſe ſuit he is condemned.*

Though a Judgment be legally ſigned, yet if it be never entred it is no Judgment. *Hill. 22. Car. B. r. For every Judgment muſt be matter of Record, but before the entry it is not ſo, the ſigning of the Judgment, is but the leave of the Maſter of the Office for the Attorney to enter the judgment for his Clyent.*

By

By the courſe of the Common Pleas, a Surety that is bound with one in an Obligation, may plead for the principle to an Action brought upon this Obligation, and acknowledge a Judgment againſt him; for they make no diſtinction betwixt the Principal and the Surety in an Obligation, but accompt it the joynt debt of both. But this ſeems very hard, and this Court wil not admit of ſuch practice. *Paſc.* 23. *Car. B.r. It is ſaid, that now the Common Pleas will not ſuffer it, but do agree in their practice in this point with this Court.*

The Defendant hath all the Term, wherein a Verdict was given againſt him to ſpeak any thing to arreſt it, (if the Plaintiff hath not given his four dayes Rules, and ſigned his Judgment, which if he hath, then it is too late to move, and the Defendant is put to his Writ of Error) for the Judgment is all the Term, wherein it was given in the breaſt of the Judges, although it be entred upon Record. *Paſc.* 23. *Car.* and 24. *Car. B. r.*

A Judgment may be entred, as to part of an Iſſue, and a *Nolle proſequi* may be entred, as to another part of it. *Paſc.* 23. *Car. B. r. This is where an Iſſue may be divided.*

When at a tryal the Defendant is called (which is uſed to be done three times diſtinctly by the Crier of the Court) and he doth not appear, Judgment ſhall be taken againſt him by default. *Paſc.* 23. *Car. B. r. That is for not appearing to make his Defence; for the Law will preſume he is guilty, and hath no Defence to make; but the Plaintiffs Councel muſt pray it may be ſo taken, for the Court doth it not* ex Officio; *yet the Defendant may afterwards give any matter in Evidence.*

If

If Judgment be given for more than the Plaintiff doth demand in his Declaration, this Judgment is erroneous. *Pasc.* 23. *Car. B. r. For to give one more than is his due, is as equal Injustice, as to deny any one that which is his due. And it shall be presumed, that the Plaintiff best knows what is his due, and will demand it to the full, or if he should not, yet it sufficeth, if he will be contented to demand less.*

If an Action of the Case be brought against one for speaking of divers, distinct, scandalous words of another, and the Dammages are laid severally for them, *viz.* so much Dammages for speaking of such of the words, and so much Damages for the speaking of such other of the words, there Judgment may be given for speaking of such of the words, as the Plaintiff was damnified by, and not for the other words, by which he was not damnified; But if the Dammages be laid entire, for speaking of all the words, and some of the words be not actionable, so that Dammages cannot be given upon all the words, there shall no Judgment or Dammages be given for any of them. For the Court cannot proportion the Dammages, according to those words which were dammageable, and those which were not.

Judgments given in inferiour Courts, must be entred, *Ideo consideratum est per curiam*, in words at length, and not *Ideo consideratum est*, &c. as the use is in the Courts at *Westminster*, for if they do not, they are erroneous there, though it be not so in the Courts at *Westminster*. *Trin.* 23 *Car. B.r. For inferiour Courts are tied strictly to observe their ancient forms, and not to vary from them; for if they should be permitted to vary from them, many inconveniences would quickly follow by the unskilfulness of the Clarks, to the great prejudice of the people.*

The

The Judgment in an inferior Court was entred, *Judic. conceſſ. eſt per Cur.* whereas it ought to have been *conſiderat' eſt per Curiam*, and for this cauſe reverſed, *Rain verſus Atkinſon. Mich. 16. Car. 2di Regis, in B.R.*

Cro. Car. 442
Sr. Stat. 16 & 17 Car. 2 C. 8.

Although the Plaintiff have ſigned his Judgment againſt the Defendant, yet he may waive it, if he will, and accept of a Plea from the Defendant. *Trin. 23. Car. B. r.* and *24. Car. B. r. For the ſigning of it doth not make it a Record of the Court, but if it were entred, he could not waive it without leave of the Court.*

A ſpecial Judgment is, where one brings an action for divers things, as for example, A man brings an *Ejectione firmæ pro tofto croſto*, &c. and the Plaintiff hath a Verdict upon the whole Declaration, and doth waive ſome one or more of the other things for which the Action is brought; in ſuch caſe he muſt releaſe his Dammages to all, and yet he may have his Coſts of Suit. *Trin. 23. Car. B. r. For the Coſts have no relation to the Dammages, the Dammages are given entirely by the Jury; but the Coſts of Suit are increaſed and ſigned by the Maſter of the Office who can beſt judge of them.*

If a Verdict paſs for the Plaintiff, and the Plaintiff will not enter his Judgment upon this Verdict, the Defendant may enter it, and ſo it is of a Writ of Enquiry of Dammages. *Trin. 22. Car. B. S. If the Plaintiff will not file it, the Defendant may do it. For the Plaintiff ought to be content with what the Law gives him; and if the Defendant might not enter it, he ſhould be hindred from pleading it in Bar to another Action brought againſt him for the ſame cauſe as the Law allows him to do.*

If

If a Clark of this Court will not appear to an Action that is brought here againſt him, the Plaintiff may enter Judgment againſt him by *nihil dicit.* By Woodward *Clark of the Court. For a Clark in Court is ſuppoſed to be alwaies preſent in Court, and there if if he will not appear, yet it ſeems it ſhall be all one as if he had appeared and refuſed to plead, Trin.* 23. *Car. B. r.*

The Court will not give a Judgment, which they know would be againſt the Law, although the Plaintiff and Defendant do agree to have ſuch a Judgment given. *Trin.* 23. *Car. B.r. For the Judges are to do equal juſtice according to their beſt skill, and not to err willfully, and againſt their knowledge to pleaſe the parties.*

If the Plaintiff will not bring in his *Poſtea* into the Court according to the Rules of the Court, that the Defendant may have time to ſpeak in Arreſt of Judgment; and the Defendant do make proof of this to the Court upon oath; the Court will Arreſt the Judgment until the Plaintiff ſhall move for Judgment. *Mich.* 23. *Car. B. r. And he may thank himſelf for this trouble and delay, by not bringing in his* Poſtea, *as he ought to have done. The like Law is in caſe of a Writ of Enquiry,* &c.

Judgment cannot be entred until four daies after the *Poſtea* is brought in and entred in the Office, that the Defendant may have liberty to offer what he can find out of the Record to arreſt the Judgment, which is counted a convenient time for him to do it, but after that if nothing be ſpoken in the mean time to Arreſt the Judgment, it may be entred. *Mich.* 23 *Car.* and *Paſc.* 24. *Car. B.r. For then it ſhall be preſumed he had nothing to ſay to ſtop the Judgment.*

If

If a Judgment be entred contrary to the Rule of
Mich. 240 Court, made to ſtay the entry of it; the Court upon motion will vacate the Judgment and amerce the party that entred it. *Mich.* 22. *Car. B.r. For his diſobedience to the Court.*

Where a Verdict is imperfect, there can be no Judgment given upon it; but the Court will grant a new *venire facias* to ſummon another Jury to try the iſſue again. *Mich.* 23. *Car. B.r. For the parties ſhall not be compelled to go further back in their proceedings than where the error was made, and that was by the Jury, in finding an imperfect Verdict.*

If one bring a writ of Error to reverſe a Judgment given in the Common Pleas, and do not remove the Record by a *Certiorari*, the Plaintiff may move in the Common Pleas for Execution, notwithſtanding the Writ of Error brought. *Mich.* 23. *Car. B.r. Becauſe he hath made no proceedings but upon the Writ of Error, and ſo it may be accounted but colourably brought, and for delay. But Q. Whether they will grant it, becauſe by the Writ of Error, their hands are forecloſed; but now by the late Act a Writ of Error is no* Superſedeas, *and ſo the Law in this point is altered.*

In a Judgment given for the Plaintiff to recover a ſum of money, the ſum muſt not be written in figures, for if it be it is error, but it muſt be expreſſed in words at length. *Mich.* 23. *Car. B.r. For a Judgment conſiſts in words, and words are made of letters and not of figures which can ſpell nothing, and figures may eaſily be altered.*

If a Judgment be given upon an Iſſue tryed in a cauſe wherein there is alſo matter of Law in diſpute upon another iſſue depending in that cauſe before the matter

matter in Law be determined, yet the Judgment is good. *Hill.* 23. *Car. B. r. For the Cauſes have no depending one upon the other.*

Upon the Affirmance by the Parliament of a Judgment given in this Court, and removed by a Writ of Error brought in Parliament to reverſe this Judgment; the Parliament uſeth to have a *Remittitur* entred upon the Judgment Roll, to ſend it back into this Court, that this Court may award Execution upon the Judgment. *Hill.* 23. *Car. B. r. For Execution ought alwaies to Iſſue out of this Court where the Judgment was given after the affirming thereof, and the Writ of Error was only to try whether the Judgment was good, and not to alter the way in taking out of Execution.*

If a priſoner which is Endicted for Felony will not plead to the Endictment, he is by the Law to be preſſed; but if a priſoner endicted for Treaſon, will not plead at all to the Endictment, or anſwers impertinently, and not to the purpoſe, judgment ſhall be given againſt him, as if he were found guilty. *Paſc.* 23. *Car. B. r. By* Rolle *Juſtice. In Sir* John Stowels *Caſe as I remember.* Q. differentiam. *It ſeems to be in reſpect of the heinouſneſs of Treaſon above Felony.*

If a *Poſtea* is returnable in Court the laſt day of the Term, although the Defendant cannot have four days liberty to ſpeak in Arreſt of Judgment, yet by the courſe of the Court Judgment may be given in the cauſe the ſame Term; unleſs the Defendant ſhall Arreſt Judgment, upon the ſame day it is retornable. *Paſc.* 24. *Car. B. r.*

If a Judgment be but 7 years old, the party may by the courſe of the Court, have a *Scire facias* to revive it without moving of the Court for it, and if the Judgment be under ten years old, the party may move

for a *Scire facias*, to revive it at the ſide Bar, but if it be ten years old or more, a *Scire facias* to revive it, muſt be moved for in Court. *Paſc.* 24. *Car. B. r.*

One may ſpeak in Arreſt of a Judgment given upon a *nihil dicit*, at any time during the ſame Term that the Judgment was obtained, before execution taken out. *Paſc.* 24. *Car. B. r. For the Defendant is more favoured in a Judgment given againſt him upon a* nihil dicit, *than where a Judgment is given againſt him upon a Verdict, becauſe in the former Caſe he makes no defence, but in the latter caſe, it is intended he hath made his full defence.*

Where one entire Judgment is given againſt two ſeveral perſons, and one of them is an Infant, the whole Judgment is void. *Trin.* 24. *Car. B. r. For it being void to the Infant, and being an entire Judgment which cannot be divided, it muſt neceſſarily be void as to the other, and ſo void in* toto.

If a peremptory rule be given for the Defendant to plead at a certain day, if he do not plead accordingly, the Plaintiff may enter Judgment againſt him, without any further moving of the Court. *Trin.* 24. *Car. B. r. For it was the favour of the Court to give him that day, to plead, and if he make no good uſe of it, it is his own fault, and the Court will not further delay the Plaintiff.*

If the Plaintiff do demur to the Defendants Plea, and the Defendant do joyn in the demurrer, if the Plaintiff will not maintain the demurrer, Judgment ſhall be given againſt him. *Trin.* 24. *Car. B. r. For thereby it is implyed that he confeſſeth the Defendants Plea to be good, and conſequently that he hath no cauſe of Action or demurrer.*

That

That which a Judg of this Court doth act in his Chamber, as a Judge of this Court, is accounted to be done in Court. *Trin.* 24. *Car. B.r. For it is in order to the proceedings in Court. Q. How far this is true.*

Where a Judgment is entire it cannot be reverſed in part, and ſtand good as to another part, but if it be not an entire Judgment it may. *Trin.* 24. *Car. B.r. For an entire Judgment cannot be divided to make one part of it good and another part of it to be erroneous.*

If the Plaintiff do give the Defendant two rules for him to plead according to the courſe of the Court, & the Defendant do not plead, when the time of theſe two rules are out, the Plaintiff may enter a Judgment againſt him upon a *nihil dicit*, but not before. *Mich.* 1644. *B.r. For then it ſhall be intended he hath nothing to plead in barr of the Action.*

If a man bring an Action of Debt againſt two Executors, and they plead they have not Aſſetts, and thereupon Iſſue is joyned, and it is found that one of the Executors had Aſſets at the time of the Action brought, but that the other Executor had not Aſſets the Plaintiff ſhall have Judgment to recover the Debt againſt that Executor who was found to have Aſſets, and a *nil capiat per billam* ſhall be entred againſt the Plaintiff, as to the other Executor, who was found to have no Aſſetts. *Mich.* 23. *Car. B.r. For the poſſeſſion that one Executor hath of the Teſtators goods is not the poſſeſſion of the other Executor, and ſo may have Aſſets, and the other not.*

It is againſt the courſe of practice in this Court to admit the principal, to acknowledge a Judgment for his Bail; but in the Common Pleas they uſe to admit it. *Mich.* 1649. *B. S. But it is ſaid that the Com-*

mon Pleas will not admit it now ſince the rules of regulation made in that Court.

If the Defendant give a Judgment with ſtay of Execution till a certain day, the Plaintiff may notwithſtanding ſuch ſtay of Execution, ſue forth a Capias, or fi. fa. into the County where the Action is laid, returnable before that day, to enable him at that day to take a Teſtatum againſt the Defendant; but he ſhall not in that Caſe ſue out a Capias to warrant a Scire facias againſt the Bail, unleſs by ſpecial agreement; becauſe it is to the prejudice of a third perſon, and the Capias ad ſatisfaciendum, in that Caſe, ought to be delivered to the Sheriff four daies before the Return be paſt. Per Magiſtrum Liveſay, & alios, &c. Paſc. 21. Car. ſecundi Reg.

If in an Action of Treſpaſs and Ejectment brought to try the title of the Land, the owner of the Land, whoſe title is concerned, will not ſave the party that is made Ejector, harmleſs from all prejudice that may befall him by reaſon of the Suite; he may confeſs Judgement unto the Plaintiff, for the Land in queſtion. *Mich.* 1650. *B. S. For to avoid further trouble and charge by reaſon of the ſuite which concerns him not, either in gain or loſs; but if the owner of the Land will ſave him harmleſs, the Court will not ſuffer him to confeſs a Judgment.*

If a Judgment is given, which is not warranted by the Verdict upon which it is given, that Judgment is not good. *Mich.* 1649. *B. S. For the Verdict ought to warrant the Judgment, for the Judgment is but in affirmance of the Verdict.*

If

If a Judgment given in an inferior Court, be not according to the ancient form of Judgments given there: ſuch Judgment is erroneous, and this Court will reverſe it upon a Writ of Error brought. *Paſc.* 1650. 24. *Maii B.S. For inferiour Courts muſt obſerve their ancient forms.*

It is dangerous to take a Judgment acknowledged in the Vacation, as of a preceeding Term; and it ought to be made a Judgment of the ſubſequent Term. *Mich.* 1649. *B. S. Yet it is common practice to do it.*

If a Warrant of Attorney to confeſs Judgment be made, without mention of any Term when the judgment ſhould be, it ſhall be intended the next Term after the date of it. *Hill.* 16. *Car.* 2. *R. in B.R.*

If one be Out-lawed in an Action brought upon a Judgment by a *nihil dicit*; and that Out-lawry is reverſed by a Writ of Error, the Judgment is alſo to be reverſed. *Mich.* 1649. *B. S. For it ſeems one may not be twice Out-lawed upon one Judgment, which might be if the Judgment ſhould not be reverſed, for the Plaintiff might bring a ſecond Action upon the ſame Judgment, & Out-law the Defendant again, yet the reverſing of an Out-lawry, is only to reſtore the perſon Out-lawed, and his eſtate to the benefit of the Law; which reverſal ſhall not prejudice or take away the Plaintiffs cauſe of Action. But if a man is out-lawed upon an Exigent* prout capias ad ſatisfaciendum; *there the Court will not ſuffer the Out-lawry to be reverſed, without payment of the money, or reverſing of the Judgment upon which it is founded.*

If one take a Judgment he cannot conſent to vacate it, becauſe it is a Record. *Mich.* 1649. *B.r. But he may acknowledge ſatisfaction upon record, and ſo make the Judgment fruitleſs.*

If the Defendant in an *ejectione firmæ*, will not plead according to the rules of the Court, there muſt be Affidavit made of ſufficient ſerving the Declaration, and then Councel muſt move upon that Ejectment, to have Judgment againſt their own Caſnee Ejector, which the Court will grant if the Affidavit is ſufficient, except he which claims title, will appear and become Defendant within ſuch time as the Court will think fit.

Nota: The Declaration in Ejectment ought to be delivered before the Eſſoin day of the preceeding Term.

Nota: Alſo that you muſt move the next Term after your Declaration delivered, otherwiſe the Court will put you to deliver your Declaration *de novo*, and the firſt delivery ſhall be void. *Hill.* 22. *Car.* 2*di. Reg. in B. r.*

A Judgment was reverſed, becauſe it was given for more than was demanded in the Declaration. *Paſc.* 1650. 3 *Maii. B S.*

A Judgment was reverſed for theſe Errors, becauſe the time when the Judgment given, was in figures. 2. Becauſe the ſum recovered was expreſſed in figures. 3. The *venire facias* was with an &c. And 4. the cauſe of Action did not appear by the Record to be within the juriſdiction of the Court where the Judgment was given. 1659. *Hill. B. S. This was a Judgment given in an Inferiour Court, and all theſe exceptions were ſaid to be good exceptions; and each of theſe is ſufficient to reverſe a Judgment.*

A Judgment was reverſed becauſe it was entred thus, *Ideo conſideratum eſt ad eandem Cur.* whereas it ought to be *per eandem Cur. Hill.* 1649. 30. *Jan.* and 1. *Feb. For it might be conſidered at the Court, which may*

be

be meant only the place where the Court is held, and yet not be the Act of the Court, viz. *of the Judges of the Court.*

After an Iſſue is joyned to be tryed by the Plaintiff and the Defendant; the Plaintiff may if he will without going to a tryal accept of a Judgment from the Defendant without any Verdict in the Caſe, which Judgment muſt be by *relicta certificatione cognovit Actionem. Paſc.* 1650. *B.S.* 21. *Maii. For the Defendant is not prejudiced by it, if he will acknowledge the Judgment, and the Plaintiff could have recovered no more if he had had a Verdict, and he may waive his coſts if he pleaſe.*

If a thing be entred in a Judgment, which is not mentioned in the Plaintiffs Declaration, upon which the Judgment is given, the Judgment is not good. *Paſ.* 1650. *B.S. Becauſe it is in part given for that which the Plaintiff ſues not, & ſo the Court had no conuſance of it.*

Judgment was given againſt one of *non ſane memorie*, and held good, for by *Rolle* Chief Juſtice, the Defendant may bring a Writ of Error to reverſe the Judgment and Aſſign this for Error. This was in the Caſe of *Diſne* and *Griſon. Trin.* 1650. *B.S.* 26. *Junii.* Q. tamen, *for thereby the Defendant is put to needleſs trouble and charge.*

A Judgment ought not to be entred, until the coſts be taxed, and the Judgment ſigned by the Secondary of the Office. 2. *Julii.* 1650. *Trin. B.S. Becauſe the coſts are to be mentioned in the Judgment.*

A Rule of Court was made upon a motion at the Bar, that the Secondary ſhould enter a Judgment in a Cauſe wherein a Tryal was to be had, as a Judgment of the Term, next preceeding the Term wherein the Tryal was to be, and that the Secondary ſhould expreſs in the Rule, that the Rule was made by

the conſent of the Plaintiff, and of the Defendant in the cauſe. 2. *July.* 1650. *B.S. For* conſenſus tollit errorem; *and otherwiſe the Court would not have made ſuch a Rule to antedate a Judgment, and there was other ſpecial reaſon as I remember for the doing of it, beſides the conſent of the parties.*

The Courſe for one to acknowledge a Judgment, is for him that doth acknowledge it, to give a general Warrant of Attorney to any Attorney or ſome particular Attorney of that Court, where the Judgment is to be acknowledged to appear for him at his ſuite, who is to have the Judgment acknowledged unto him, and to receive a Declaration from him, and to plead *Non ſum informatus*, or acknowledge it before a Judge, or to let it paſs by *nihil dicit*, and thereupon Judgment is entred of courſe for want of a Plea. 14. *Nov.* 1650. *B.S.* Non ſum informatus, *is as much as to ſay that he is not enformed by his Clyent what to plead for him.*

A Judgment upon a *nihil dicit* is not a perfect Judgment, until the Writ of Enquiry of dammages taken out upon this Judgment be executed, (except it be in Debt, for there needs no Writ of Enquiry.) 16. *Nov.* 1650. *B.S. For the dammages are to be expreſſed in the Judgment, which cannot be known what they are, until the Jury Empannelled by the Sheriff, to enquire of the Dammages have found them; becauſe the dammage were never enquired of by the Jury that ſhould have tryed the Cauſe, if it come to a tryal upon a Plea, and an iſſue joyned.*

When a Plea is pleaded, if the Attorney on the other ſide will not ſet his hand unto it as he ought, and joyn in the Iſſue, Judgment may be entred againſt him

him by the Defendants Attorney by default. 6. *Feb.* 1650. *B. S.*

If a Judgment in an *ejectione firmæ*, be as to the dammages, & *quod recuperet Terminum*, &c. *quod recuperare debeat*, and a Writ of Error be brought to reverse this Judgment, this Writ of Error is well brought, for here is Judgment given for the present, *viz. quod recuperet Terminum. Trin.* 1651. *B. S.*

By *Rolle* Chief Justice, a Judgment ought not to be entred for want of a Councellours hand set unto a special Plea, as by the Rules of the Court there ought to be, without first acquainting of the Secondary of the intention to enter Judgment, for such a Plea without a Councellours hand, is a Plea, and it may be there needeth not a special Plea, and the party must not be his own Judge, whether it be good or no. *B. S. But the Master of the Office is to direct such matters.*

By *Rolle* Chief Justice, in an Action of Trespass brought *quare vi & armis*, a *Capiatur* ought to be entred upon the Judgment where the Judgment is given before the Act of Oblivion was made, but if Judgment be to be given in an Action brought for a Trespass done since the Act of Oblivion was made, and which is pardoned by the Act, *pardonatur* ought to be entred upon the Judgment; and so the Judgment in the Trespass, and the Act of Oblivion are both satisfied. 1651. *B. S. For the* pardonatur *doth imply he should have been taken, had not the Trespass been pardoned.*

By *Glyn* Chief Justice. *Pasc.* 1656. It is against the course of the Court to vacate a Judgment the last day of the Term.

One may speak in Arrest of a Judgment given upon

upon a *nihil dicit*, after the Writ of Enquiry of dammages is executed upon that Judgment. *Mich.* 23. *Car. B. r. For till the Writ, the Judgment cannot be perfected.*

In the Caſe of one *Manu. Hill.* 1655. *B.S.* A Rule was made, That a Judgment ſhould not be entred upon a Verdict obtained in an Action of Debt. 13. *Car.* until the Court was moved in it. *Q. del ley.*

Infant.

An Infant ought not to appear to an Action brought againſt him by his Atturney; but he muſt appear by his Guardian. *Paſc.* 24. *Car. B. r. For he cannot make an Attorney, and the Guardian is aſſigned (but with the conſent of the Infant) by the Court. Trin.* 24. *Car. B. r. Yet if the Infant will not conſent to it, the Court may aſſign a Guardian, or elſe it would be a great prejudice in delaying of juſtice.* Q. tamen. *But the uſual way is to ſue the Sheriffs Bond taken with ſuretyſhip for his appearance, which may be proſecuted till ſuch infant ſhall appear by his Guardian.*

If an Infant declare by Guardian, or Prochein amy, the Defendant is not compellable to plead, until the Plaintiff ſhews a Rule of Court for his admittance. Per Magiſtrum Liveſay, & alios &c. Paſc. 21. Car. 2di. Reg.

An Action of Debt doth lye againſt an Infant upon his promiſe to pay for neceſſaries, as meat and drink, lodging and apparrel; but if the Infant and the party from whom he had theſe neceſſaries, do come to an account, and reduce that which the Infant is endebted

debted for them, to a certain ſum of money, and upon this account the party brings an Action againſt the Infant, for the money ſtated to be due by the account; this Action will not lye againſt the Infant. *Trin. 24. Car. B. r. For the account upon which the Action is grounded, is void; for an Infant can agree to no ſuch account; for the Law doth not account him a perſon able to ſtate an account.*

If an Infant be ſued, he cannot regularly appear or plead by Guardian without admittance, but if he do, it is only a miſdemeanour in the Attorney, for which the Court may puniſh him if they pleaſe, but no Error. Per Magiſtrum Liveſay, & alios, &c. Paſc. 21. Car. 2di. Reg.

Juſtification.

Where the Action concerns a tranſitory thing, if the Defendant do juſtifie the taking or doing in one place, this is a Juſtification in all places; but if the Action concern a local thing, a Juſtification in one place, is not a Juſtification in another place. *Paſc. 24. Car. B. r. For in the former Caſe the place is not material, but the meer doing or taking of the thing, is the ſubſtance upon which the Action is grounded; but in the latter the place is material, for the Defendant (it may be) may be able to juſtifie the doing or the taking of the thing in one place, and yet he may be guilty in another place.*

Juriſdictions.

Jurisdiction.

The essential difference betwixt free Chappels and other Churches, and Chappels is, that all free Chappels are free from the Jurisdiction of the Ordinary. *Hill. 23. Car. B. r. So that the Ordinary is not to intermeddle with them in any thing that doth concern them, or to visit them; whereas all other Churches, and Chappels are within the Jurisdiction of some Ordinary, and may be visited.*

The Jurisdiction of a Court where a cause is depending, cannot be extended further in relation to that Cause by the consent of the Plaintiff and Defendant, than of right it ought to extend. *Pasc. 24. Car. B. r. For this would be for the parties to erect (as it were) a Court which was not before, for the tryal of their cause; and by this means the Jurisdiction of every Court would grow to be unlimited, which would be inconvenient.*

This Court hath no conusance of the proceedings in Parliament. *Pasc. 24. Car. B. r. So held in* John Lilburn *Case; because the parliament is the supreme Court, and subject to no other Court.*

This Court hath a general Jurisdiction to reform the abuses of all persons in their behaviour throughout all *England*; and the abuses and miscarriages of all Courts of Justice, throughout all *England*. 9. *Feb. Hill.* 1649. *B. S.* 3. *Julii.* 1650. *B. S. For the good behaviour of all persons doth much conduce to the peace of the Nation.*

If the Court of Chancery do grant a *Habeas Corpus* to a prisoner that is in the custody of the Marshal of this Court, this Court hath no power to restrain the prisoner, so long as the *Habeas Corpus* is in force. 3. *July.*

July. 1650. *Trin. B. S. In the Case of Sir* Arthur Smithes *and* Workman. *For if it should be so, this would be for the Authority of one Court to interfere with another.*

This Court hath Jurisdiction over all the Courts of *England* in all Mandatory Writs. 10. *Feb.* 1650. *B. S. Which are such Writs which proceed out of this Court, as the Superintendant Court, and supreme Judicature.*

This Court hath power to grant a *Mandamus* to a Colledge, to command them to admit a Fellow there. *Doctor* Patricks *Case. Trin.* 18. *Car.* 2*di. Reg. in B. R.*

Injunction.

An Injunction out of the Court of Chancery doth not lye to stay execution after a Judgment given at the Common Law; although the Bill upon which such Injunction is granted, were put in before the Judgment given at Law, for although the Chancery make a difference between exhibiting the Bill before the Judgment given, and the exhibiting a Bill after the Judgment given, yet this is no good difference, for it is a like in both Cases. *Trin.* 23. *Car. B. r. But the Chancery may, if there be cause, stay proceedings at Law before Judgment given, and the Chancery doth sometimes stay Execution*: sed Q. quo jure.

Information.

If by a penal Statute he that preferrs an Information against another, for an offence done against this Statute, is to have half of the penalty, which shall be recovered

recovered upon this Information, there if an Informer do prefer an Information upon the Statute, before any Information is preferred by the King; the King cannot hinder the Informer from having his proportion of the penalty given him by the Statute; but if the King do firſt prefer the Information, he may Inform for the whole penalty. *Paſc.* 23. *Car. B. r. For the King is not bound to ſtay till an Informer prefer the Suit, but may ſue at any time, and if no body Inform, none hath right to the penalty, but the King, and therefore he may pardon it, if he pleaſe, without wrong to any.*

If the Marſhal of the Kings Bench do miſdemean himſelf in his office, to the prejudice of any perſon, he who is prejudiced by his miſdemeanour, may prefer an Information againſt him in this Court: *Hill.* 23. *Car. B. r. And if he be found guilty upon a tryal thereupon had, he may be fined by this Court, and ſhall make ſatisfaction to the party alſo as it ſeems. Q. If the Court can put him out of his Office.*

The Clerk of the Crown ought not to ſet his hand to an Information without examining the cauſe, for which it is preferred. *Paſc.* 24. *Car. B. r. For if there be not (at leaſt in probabilities) good matter in Law to ground an Information upon, the party that doth prefer it, is not to be aſſiſted and encouraged in it; for the Law doth abhor vexatious, and cauſeleſs ſuites, eſpecially in Criminal matters, which are more penal than Civil Actions.*

An Information may be preferred in this Court againſt the Inhabitants of any Town or Village in *England* for the not repairing the High-waies which by Law they are bound to repaire. *Mich.* 1649. *B. S.*

For

For this Court may puniſh offences done againſt the Weal Publick all England *over, if other Juriſdictions be negligent to do it.*

If an Information be preferred at the Suite of the party, there the Endictment ought to be brought to a tryal at the charges of the party, that proſecutes the Endictment; becauſe it is intended he is to receive a particular benefit by the conviction of the Defendant: but if an Endictment be preferred at the Suite of the King, there the Endictment ſhall be brought to tryal at the coſts of the party againſt whom the Information is brought. *Paſc.* 1650. 24. *Maii, B. S.* Q, rationem unde, *it ſeems it is becauſe the King is not to be put to charges in any ſuite which concerns the publick.*

Although an Information be faulty in the body of it, yet upon a motion the Court will not quaſh it, but the Defendant muſt demur to it for its inſufficiency. *Paſc.* 1650. *B. S.* 24. *Maii. But it is otherwiſe of Endictment, the difference ſeems to be, becauſe Informations uſe to be preferred for greater offences and more pernicious to the Common wealth, than Endictments uſually are.*

Juſtice of Peace.

A man may be a Juſtice of Peace in one part of *Yorkeſhire*, and yet not be a Juſtice of Peace in every part of the County. *Hill.* 22. *Car. B. r. For* Yorkſhire *is divided into divers parts, called Ridings,* viz. *into the Eaſt Riding, Weſt Riding, and North* Riding; *and he may be a Juſtice of Peace in one of thoſe Ridings, and yet not a Juſtice of Peace in another of thoſe Ridings; but generally a Juſtice of Peace of a County,*

County, is a Juſtice of Peace all the County over; although it be not ſo in York-ſhire, *by reaſon of the large extent thereof, which is thus divided for the more eaſie, and better government thereof.*

The Peace was prayed upon Articles read in Court againſt one, one of which Articles was that the party againſt whom the peace was prayed, did threaten that he would burn down the houſe of him that prayed the peace; and upon that Article it was granted. *Hill.* 21. *Car. B. r. And upon good reaſon; for though words are but wind; yet they often cauſe the breach of the peace, and threatning words do moſtly proceed from malice prepenſed, which is apt to break out into open violence. To grant the Peace againſt one, is to grant that the proceſs of the Court may iſſue out of the Crown Office againſt him, to bring him into the Court, to find Sureties to be bound with him in a recogniſance to the King to keep the peace towards all the Kings Liege people, but more eſpecially towards the party that praies the Peace.*

A Juſtice of Peace ought not to bind any perſon to the good behaviour, upon a general information, and if the party accuſed, doth refuſe to be ſo bound, and find Sureties to be of good behaviour; yet the Juſtice of Peace ought not by the Law to ſend the party to the Gaol for refuſing it. *Paſc.* 23. *Car. B.r. For he that deſires to have one bound to the good behaviour, muſt ſhew ſome particular miſcarriages, wherein the miſbehaviour of the party conſiſts; for* accuſatio generalis eſt nulla, *for no defence can be made to it for the incertainty thereof.*

The Juſtices of Peace ought by the duty of their places to attend at the Aſſizes, and at the publick Seſſions of the Peace, held for the County, whereof they

they are Juſtices. *Paſc. 23. Car. B. r. To diſpatch the publick buſineſs concerning the Peace and good governing of the County.*

The Commiſſion of Oyer and Terminer doth extend to thoſe that are Juſtices of the peace. *Paſc. 23. Car. B. r.* Q. *Whether it be generally ſo to all, it ſeems not.*

A Juſtice of Peace may actually Arreſt and commit the party to priſon, that doth a Felony in his own view, without any warrant made under his hand and ſeal to arreſt him; for there needs not other proof of the matter; but if there be an information made to a Juſtice of Peace, that one hath committed Felony, there the Juſtice muſt make a Warrant under his hand and ſeal to Arreſt the Felon, and he may not do it by word of mouth. Q. 1650. *B. S. For it muſt appear by what authority the party was committed.*

It is uſual in the Crown Office, if one be bound to the peace there, to keep him bound to the peace during his life. But by *Rolle* Chief Juſtice, there is no reaſon why this ſhould be done. 13. *Maii.* 1651. *B. S. For the party may become reformed, and ſo no cauſe to continue him bound and his Suertie for ſo long a time. I ſuppoſe it is done for the benefit of the Clerks of that Office, and ſometimes at the deſire of the party, for ſome particular reaſon,*

A Juſtice of Peace may require a Bond or Recognizance of a thouſand pound of one for his keeping the peace if he ſee cauſe for it, in regard that the party to be bound, is a dangerous perſon, and likely to break the Peace, and to do much miſchief. *Paſc.* 1652. *B. S. For there cannot be too much caution uſed in preventing the breach of the Peace in ſuch Caſes.*

This Court will bind one to the Peace if they ſee cauſe to do it, although there be no Oath made by any perſon againſt him that is to be bound, that he goeth in fear of his life of him. *Trin.* 1652. *B. S. For the Oath of a party is but to manifeſt unto the Court, that there is juſt cauſe why the party ſhould be bound unto the Peace. and therefore if the Court be ſufficiently ſatisfied without ſuch an Oath, that there is good cauſe to bind the party to the peace, they may do it without ſuch an Oath: For where things are in themſelves manifeſt, there needs no evidence to prove them.*

If one do take his Oath in this Court againſt another, that he doth go in fear of his life of him, and prayes the peace againſt him, he againſt whom the peace is thus ſworn, and the Peace prayed, ought to be committed to priſon, if he do not find Sureties to keep the peace, although there be no Articles exhibited and ſworn againſt him. 1652. *B. S. For there appears ſufficient cauſe by the Oath for the Court to do it, though there be no Articles exhibited, as the uſual courſe is to do.*

Iſſues.

If the Defendant give the Plaintiff a Rule to enter his Iſſue, the Action lying in London, or Middleſex, the Plaintiff muſt bring in his Record into the Office, within four daies after notice of the Rule, and if the Action lye in the County, he muſt bring it in before the continuance day of that Term, or in Default thereof, a non-ſuite may be ſigned and entred. Per Magiſtrum Liveſay, & alios, &c. Paſc. 21. Car. ſecundi Reg.

In Actions lying in London or Middleſex, the Defendant ought not to give the Plaintiff rule to enter his Iſſue, or to try the Cauſe by Proviſo the ſame Term iſſue is joyned, unleſs the Plaintiff hath firſt given the Defendant notice of tryal that Term, and hath made default, and if the Action lye in the Country, the Defendant ſhall not give the Plaintiff a rule to enter his Iſſue the ſame Term Iſſue is joyned. Per Magiſtrum Liveſay, & alios Cler. Paſc. 21. Car. 2di. Reg.

The Court doth uſe upon a motion, to order that good Iſſues be ſet upon a Sheriff or other Officer, for not bringing in the body of the party into Court, upon a Writ of *Habeas Corpus* directed unto him, or for not making a good retorn; but they will not order what ſum ſhall be ſet upon him, but leave that to be done according to the cuſtom of the Court. *Hill.* 21. *Car. B.* r. *For where things are to go on in a common way of practice, there the Court will not make a ſpecial Rule in the Caſe. Iſſues are the ſums of money wherein he is amerced to the King for not doing his duty in his Office. It ſeems they are called Iſſues, by reaſon they are to be levied out of the Iſſues and profits of the Sheriffs Lands.*

When Iſſues are ſet upon a Sheriff or other Officer by the Court, for the neglect of his duty; and afterwards upon ſome reaſons ſhewed to the Court, why they ſhould be taken off or diſcharged, the Court doth diſcharge them: the Roll ought to be marked, to ſhew they are diſcharged, otherwiſe Proceſs may iſſue out to levy theſe Iſſues, notwithſtanding they

are diſcharged by order of Court. *Hill.* 22. *Car. B. r. For as the Iſſues do appear upon the Record, ſo they cannot be diſcharged but upon record.*

If an Iſſue be not well joyned, it is helped after a verdict, by the Statute of *Jeofailes*: but if the Iſſue be an immaterial Iſſue, and a verdict paſſeth, this is erroneous and is not helped by the Statute. *Mich.* 23. *Car. B. r. But there muſt be a repleader, to the intent there may be an Iſſue joyned, upon which a tryal may be had. For the Statute was made to help defective Iſſues after a Verdict, but not to ſupply an Iſſue where there was none.*

Judges.

A Judge of the Kings Bench cannot be made by Writ, but by Patent and Commiſſion; but he may be diſcharged by Writ *ſub magno Sigillo.* 5. *Ed.* 4. 137.

Thorpe Judge of the Kings Bench, was at the will of the King, for his body, lands, and goods, becauſe he had done a thing contrary to his Oath. 40. *Ed.* 3.

Judge *Ingham* was in *Miſericordia Regis*, for cauſing a Record to be raſed, and making an amercement of a poor man ſet at 6. *s.* 8. *d.* to be but 2. *s.* 4. *d.* 2 *R.* 3. 9.

The Judges are to have a paper of the Cauſes which are to be ſpoken to in Court, ſent unto them particularly, at five of the clock in the evening, the day before they are to be ſpoken to in Court. *Hill.* 22. *Car. B. r. That they may have time to conſider of the buſineſs of that day, and prepare to ſpeak to them.*

Juſtices of Oyer and Terminer, cannot proceed to try perſons endicted upon Endictments not preferred before

before themselves, but the Justices of the Gaol delivery may. *Trin.* 23 *Car. B. r. For the Justices of Gaol-delivery, have a more general Commission for proceeding against and trying of malefactors, than the Commissioners of Oyer and Terminer have.*

The Judges of the Common Law, have no ordinary jurisdiction to examine Witnesses in their Chambers, but by the consent of the parties, and by the Rule of the Court they may do it: and there useth not to be any cross examinations of the party, but the course is, to put the Depositions in writing on both parts, and then the Judge doth examine the parties upon their several Oathes, whether their Depositions be true. *Mich* 23 *Car. B. r. Yet by a Rule of Court, there may be cross examinations of the parties on both sides.*

Where there do special and doubtful matters arise upon the reading of a Record, so that the Court is not (for the present) satisfied of the Law; the Attorneys on both sides ought to prepare Books, *viz.* Copies of the Record for the Judges, at the Clyents equal charge, that the Judges may upon view of the Record, the better consider of the matters in dispute. *For it is the course for the Attorneys, to make their Clyents for to pay for such Books in all such Cases.* By *Rolle* Chief Justice.

The Judges of this Court declared, that they would not sit longer in Court, than till one a clock in the afternoon upon the last day of the Term, and so they said the Common Pleas had done. *Trin.* 1651. *B. S. This was, that the Attorneys might not defer their Clyents businesses to the last of the Term, as too usually some do, to the great toyl of the Court, and the prejudice of their Clyents.*

Jeofailes.

Jeofailes.

Q. If an Issue be joyned upon a collateral point, if there be no place alledged whence the Venue may come, this is aided by the Statute of Jeofailes; but if the Issue be not joyned upon a collateral point, and there is no place alledged from whence the Venue may come, it is not helped by the Statute. *Mich. 22. Car. B. r. Vid. the Statute.*

Interrogatory.

One who is by the rule of the Court to be examined upon Interrogatories, ought to attend the Master of the Office, who is to examin him within four daies after the Interrogatories are put in for him to be examined upon. *Mich. 22. Car. B. r. For the speedier dispatch of Justice, and he is not bound to attend before, that he may have sufficient time to prepare to answer.*

Intendment and Intentions.

The Law doth not punish any one for the Intention to do ill, if the Intention be not put in execution, except it be in the case of Treason; for there Intentions, if they be clearly proved by circumstances, shall be punished equally as if they had been put in execution. *Trin. 22. Car. B. r. But this is only in high treason, and is done* in terrorem, ut pœna ad paucos metus ad omnes, *to deter men from that odious offence, and of so high a nature, being not acted against*

gainst the person of one sole person, but even against the whole Kingdom, which would suffer by it, were they put in execution.

There shall not be intended to be more than one Parish in a City, although there be many; except the contrary be shewed. *Trin. 24. Car. B. r. For it is not of the essence or constitution of a City, to consist of more Parishes than one, but there may be a City that hath but one Parish in it, as the City of* Rochester *in* Kent, *in which is only the Parish of Saint* Nicholas.

If one be bound in an Obligation to *J. S.* in a certain sum of money, and in the *solvendum* of the Bond, it is not expressed unto whom the money shall be paid, the Law will intend it is to be paid to the Obligee. *Pasc. 24. Car. B. r. Because no other person is particularly named, unto whom the payment should be made; for it shall be intended, the money was to be paid to some body, and there being no person particularized to whom it should be paid, it is but reasonable it should be paid to the Obligee. So it is if there be no time limited for the payment of the money, the Law saith, it ought to be paid presently.*

A Court which is pleaded (generally) to be held *secundum consuetudinem*, shall be intended to be held according to the Common Law; but if it be pleaded to be held according to a Custom, whereof the memory of man is not to the contrary, it shall be adjudged to be a Court held by Custom. *Trin. 24. Car. B. r. For a Custom must be so particularly pleaded, but a general Custom is Common Law.*

If the Plaintiff do plead, that the Defendant did become bound unto him *per Obligationem suam*, it shall be intended, that this Obligation was sealed and delivered

delivered unto the Plaintiff. *Mich. 24. Car. B. r. For elſe he did not become bound unto him by his Obligation, for an Obligation that is not ſealed and delivered is no Obligation, nor is the Obligee bound by it, and he need not plead that it was ſealed and delivered.*

The Intent of the parties ſhall not be implied againſt the direct Rules of the Law, 5. *Feb. Hill.* 1649. *B. r. For an Intent is but to be gueſſed at, and doth not certainly appear: but the Law is direct and plain, and therefore it ſhall not be preſumed, the parties did mean to do any thing againſt Law, where their Intent doth not appear by expreſs words; for the Law doth alwaies make charitable conſtructions of doubtful matters.*

Impoſſibility.

A thing which is Impoſſible in the Law, is all one with a thing which is Impoſſible in nature. 21. *Car. B. r. For the Common Law is not contradictory in any thing to the Law of nature, but agrees with it in all things and may be ſaid to be the ſame in effect with it, and ſo ſhould all good Lawes be.*

Impropriation.

An Impropriation cannot be made but by the Licence of the King, although the Pope did formerly uſurp that authority in this Dominion. *Mich. 1649 B. Sup. And the King may do it as he hath ſupreme authority in all Eccleſiaſtical, as well as civil matters, within his dominions. See the Statutes in this caſe.*

Liv-

Livery and Seisin.

A Corporation cannot make Livery and Seisin to pass away the Freehold Lands belonging to the Corporation, but they may make a Letter of Attorney to another, under their common Seal, to make Livery and Seisin for the Corporation. *Mich.* 23. *Car. B. r. For Livery and Seisin must be made by one, and not by a multitude. And a Corporation can do no Acts but under their Common Seal.*

If a Tenant for years of Land, do consent that Livery and Seisin shall be made of the Land let unto him, unto him that hath purchased the reversion of those Lands, and it be made accordingly, this is a good Livery and Seisin to make the reversion pass, although that the Tenant for years do not go off from the Land at the time when the Livery and Seisin was made, but was then in actual possession of it. *Mich.* 23. *Car. B. r. For his Term is not prejudiced by the Livery: For only the reversion passeth, and his Assent amounts but to an Attornment to him, to whom the Livery is made.*

If a Deed of Feoffment be made of Land, *Habendum à die datus*, and the next day after the date of the Deed, the Feoffee gives Livery and Seisin of this Land, this is a good Livery and Seisin; but if this Livery and Seisin were made by an Attorney, *Nil operatur.* Mich. 23. Car. B. r. A thing that is to take effect, *à die datus*, is not to take effect until the next day after the Deed bears date.

A. makes a Lease to *B.* for life, *Habendum à die confectionis*, and Livery is made by *A.* himself a month after; and it was there held that the Livery was

good, it being made by the Feoffer himſelf; but if it had been executed by Letter of Attorney, then *nil operatur*, by this future Livery. *Smith* and *Boles* caſe, *Croo. Jac.* 458.

One may give Authority by Paroll unto another, to take Livery and Seiſin of Lands for him; and if ſuch Livery and Seiſin be taken accordingly, it is good. By Rolle *Chief Juſtice.* Mich. 1650. B. S. *For this ſhews his aſſent to take the Lands by the Livery and Seiſin, and the other is but as a Conduit-pipe to convey the Land unto him from the Feoffer.*

Leaſe, Leſſor and Leſſee.

If one take a Leaſe by Indenture for years of a ruinous houſe, or that wanteth Reparations, and do covenant in the Leaſe to leave the houſe at the end of the term in good repair, he is bound to do it, and an Action of Covenant doth lie for the Leſſor againſt him, if he do it not, 21. *Car. B. r. But if he had not covenanted expreſly to do it, he had not been bound by Law to do it. For the Law binds not the Leſſee to leave the thing lett in better condition then it was when it was firſt lett unto him, except he bind himſelf by an expreſs Covenant to do it.*

A Leaſe which is only voidable, and not abſolutely void, muſt be made void by the Leſſors re-entry; but if a Leaſe be abſolutely uoid, there needeth no re-entry. 21. *Car. B. r. That is ſaid voidable which may be made void, if the Leſſor will, and may be continued, if he pleaſe, at his election the Leaſe is made void by re-entry, and putting out the Leſſee, or elſe it is continued or affirmed by receiving the rent, and thereby acknowledging him ſtill for his Tenant.*

Where

Where the Freehold of Lands in queſtion, in an Action of Treſpaſs and Ejectment is entire, although theſe Lands be lett out to ſeveral perſons for years by ſeveral Leaſes, if he whoſe title is concerned, and doth intend to try the Title of theſe Lands, do ſeal a Leaſe of Ejectment upon the Lands only that are in the poſſeſſion of one of the Tenants that holds parcel of theſe Lands; This is a good Leaſe, to try the title of all the Lands: But if the Free-hold of the Lands in queſtion, be not an entire Free-hold, ſuch a Leaſe ſealed upon parcel of the Lands in queſtion, is not good to try the title of all the Lands. *Paſc. 23. Car. B. r. For ſeveral Free-holds muſt have ſeveral Leaſes to try them: becauſe they are the Right and Titles of ſeveral perſons, or may be held by ſeveral Titles.*

A Leaſe for years, although it be a very long Leaſe, cannot be entail'd (but may be aſſigned in Truſt to ſeveral uſes, which may be an entail in effect) for the nature of a Chattel cannot be turned into an Inheritance. *Hill. 23. Car. B. r. Which would be if ſuch a Leaſe which is but a Chattel, might be entailed: for an eſtate entail is an Eſtate of Inheritance; yet in Chancery they do often make good ſuch entails made by Will.*

A Leſſee for years is not bound to repair the houſe lett unto him, which is burned by accident: if there be not a ſpecial Covenant in the Leaſe, that he ſhall leave the houſe in good repair at the end of the term: But if the houſe be burned by the negligence of the Leſſee, or his Servants, Wife, or Children, he ſhall repair it, although there be no ſuch Covenant in the Leaſe to do it. *Paſc. 24. Car. B. r. For by the Leſſees Covenant, it ſhall be intended, that he took notice of what accidents might happen, and his Covenant ſhall*

be taken generally, and without exception, and ſtrongeſt againſt himſelf; for negligence which is prejudicial to another, is puniſhable in Law.

In a Leaſe for years by Indenture the term is not certain before the *habendum & tenendum* in the Leaſe. *Term. Trin.* 24. *Car. B.* r. *For though it do appear before the* habendum & tenendum, *that the Lands in the Leaſe mentioned are demiſed unto the Leſſee, yet it doth not appear for how many years they are demiſed, nor when the Leaſe is to begin, nor when to end, until it is declared in the* habendum.

One may raiſe an Eſtate for life in Lands to another by way of uſe, (*viz.* by covenanting with *A. B.* in conſideration of natural love and affection, *&c.* but a Covenant in conſideration of affection only, or for money only is void, and the Eſtate ſhall never riſe upon it, to ſtand ſeiſed to the uſe of *J. S.* for and during the natural life of *J. S.*) without Livery and Seiſin. *Mich.* 24. *Car. B.* r. *For the Eſtate is executed in the ceſtuy que uſe, by the Statute of Uſes of* 32. H. 8. *without Livery.*

If one be in Poſſeſſion of Lands of another, and hath uſually paid a Rent unto him for theſe Lands, although it cannot be expreſly proved, that the Lands were demiſed at will to him that is thus in poſſeſſion of the Lands, that is, that he ſhould hold them as long as both parties ſhould pleaſe, yet this holding of the Lands ſhall be interpreted to be by a Leaſe at will. *Mich.* 1650. *B. S. For it ſhall be preſumed that he in poſſeſſion doth hold the Lands, and that the owner of the Lands did receive the Rent for thoſe Lands upon ſome Contract made between the parties, for holding the Lands for ſome term, and for paying of ſuch a rent for them, and a leſs time cannot be ſuppoſed, then to hold them at will.*

If

If one make a Leaſe for years, and after the Leſſor enters upon the Lands lett, before the term is expired or determined, and doth make a Leaſe of theſe Lands to another, this ſecond Leaſe is a good Leaſe, until the firſt Leſſee doth re-enter. 2. *Maii. Paſc.* 1650. *B. S. And then the firſt Leaſe is revived, and the firſt Leſſee is again in poſſeſſion by virtue of the firſt leaſe.*

Although a Leſſee for years do loſe his Indenture of Demiſe, of the Lands lett unto him, yet he ſhall not loſe his term in the Lands lett by the Indenture, which is ſo loſt, If it can be proved any way, that there was ſuch a term lett unto him by Indenture, and that it is not determined: ſo it is of any other Eſtate in Lands, if the Deed that created the Eſtate be loſt, if it can be proved, that there was ſuch a Deed made, and that ſuch an Eſtate was conveyed by the Deed. *Paſc.* 1650. 14. and 15. *Maii.* 1650. *B. S. For the Eſtate in the Lands is derived from the Party that made the Deed, and not from the Deed, otherwiſe then inſtrumentally and declaratively, to ſhew his mind and intent that conveys the Eſtate, as alſo the mind and intent of him that receives it, and the loſing of the Deed can make no alteration herein.*

Liberty.

Matters which do concern the Liberty of any one, ought to be determined as ſpeedily, as lawfully they may be. *Trin.* 22. *Car. B. r. For liberty is counted very precious, and exceedingly favoured in Law, not only in reſpect of the particular profit, which every one obtains by his Liberty, but alſo in reſpect of the Weal-publick; For one in Priſon is diſabled to be uſeful to himſelf, or any other; and every good Subject is uſeful as well to the publick as to himſelf.*

Where any thing is ſhewed to be done within a Liberty or a Franchiſe, there it is not neceſſary to ſhew within what County that Liberty or Franchiſe doth lie. *Trin. 23. Car. B. r. For the Franchiſe hath no relation to the County.*

Leet.

If a Court Leet do not chooſe a Conſtable to ſerve within that Leet, the Quarter-Seſſions of that County, where that Leet is, may chooſe one. *Mich. 22. Car. B. r. For the Cammon-wealth muſt not be unſerved, and it much concerns the Peace of the Common-wealth, but more eſpecially of the County wherein the Leet lies, to have ſuch Officers choſen.*

Q. *Whether a Court Leet may enquire of private Aſſaults and Batteries, if there be no bloud-ſhed in the caſe? For* Bacon *Juſtice, and* Walker *Apprentice of the Law of the Inner-Temple, held that a Court Leet might enquire of them. But* Rolle *Juſtice held the contrary.* Paſc. 24. Car. B. r. *Becauſe they are actionable to the Common Law only, by the Parties injured, and are not publick offences againſt the publick.*

Limitation.

If a Limitation of an Eſtate in Lands be uncertain, ſuch a Limitation is not good in Law, but void. *Hill. 22. Car. B. r. For the Law cannot tell what conſtruction to make of ſuch a Limitation, by reaſon of the incertainty of it, nor how to direct the eſtate limited, and therefore the eſtate ſhall remain as if there had been no ſuch limitation.*

There is a difference between a condition precedent,

dent, annexed to an eſtate ſubſequent to this condition, and a Limitation ſubſequent annexed to an Eſtate preſently veſted. *Hill.* 22. *Car.* B. r. *In reſpect of the incertainty of the former eſtate and the certainty of the latter eſtate, which hath no dependency upon the limitation.*

A thing that is expreſly limited in a Will by plain words, ſhall not be afterwards made incertain, by general words which follow in the ſaid Will. *Hill.* 23. *Car.* B. r. *For that were to encounter a thing that is plain and certainly known, with that which is obſcure and doubtful, and to make doubts inſtead of clearing of them.*

A Limitation of an Eſtate to begin after the determination of an abſolute Eſtate in Fee-ſimple, is a void Limitation in Law, for if the Law ſhould ſuffer ſuch a Limitation to be made, this would be to ſuffer perpetuities to be made, which the Law doth abhor; but yet a Limitation of an Eſtate to begin after a Fee-ſimple upon a Contingency, is a good Limitation. 19. *April.* 1650. B. S. *For ſuch an Eſtate in Fee may never take effect, and ſo it is not an abſolute Eſtate in Fee-ſimple. And ſo is* Pell *and* Brown *Caſe in* Cro. Jacobi.

London.

By the Ancient cuſtom of the City of *London*, there ought to be but four hundred Carmen allowed within *London*. Hill. 23. Car. B. r. *But now that number may be encreaſed, if there be occaſion to have more.*

Latitat.

In the Caſe of *Abbot* againſt *Camby*, Hill. 1656. B. S. *It was ſaid by the Court that a* Latitat *cannot iſſue out of this Court into the County of* Middleſex, *for it is againſt the very ſuppoſal of the Writ, but it muſt be a Bill of* Middleſex, *which is in the nature of a* Latitat.

A Latitat out of this Court is in the nature of an original Writ, or *Clam fregit*, by which they proceed upon in the Common-Pleas. *Mich.* 1649, B. S. *And is of Antiquity beyond the memory of man.*

Mareſchal.

THe Mareſchal of the Mareſchalſea of this Court is intended to be always in Court, while the Court is ſitting. 21. *Car.* B. r. *For it is his Office to be always attending upon the Court to execute his Office in relation to the Court upon all occaſions that may fall out ſitting the Court. And he is finable for his abſence.* Hill. 21. *and* 22. *Car.* 2. Regis *in* B. r.

Monſtrance.

None ſhall be compelled to ſhew a thing in pleading, which by common intendment they cannot have knowledge of. 22. *Car.* B. r. 38. *H.* 6. *f.* 3. *For the Law doth not require unreaſonable things to be done.*

Motion

Motion to the Court.

Monday is a ſpecial day for motions in this Court by the ancient courſe. I ſuppoſe it is ſo, becauſe the Court and Councel cannot be ſo well prepared to ſpeak in ſolemn matters on that day, in regard of the Lords day which immediately precedes. *Mich.* 22. *Car. B. r. Yet motions are made upon any day, as the buſineſs of the Court of the day will permit.*

One ought not to move the Court for a thing againſt which they have delivered their opinion. *Trin.* 22. *Car. B. r. But ought to reſt ſatisfied with the Judgment of the Court, and to ſubmit thereunto.*

If monies be upon a motion ordered to be brought into the Court, and are accordingly brought in, they ought not to be taken out of the Court, but upon a motion, and rule of the Court made therein. *Hill.* 22. *Car. B. r. For when they are brought into the Court, they are in the cuſtody of the Court, and to be diſpoſed of by their directions only.*

If any thing be moved to the Court upon a Record, if the Record upon which the motion is made be not in Court when the motion is made, the Court will make no Rule upon ſuch a motion. *Hill.* 22. *Car. B. r. For the Court will be ſatisfied by the Record, whether the matter of the Record upon which the motion is grounded, be ſo as is ſuggeſted by the Councel, and will not reſt upon ſuggeſtions made at the Bar; For the Court judges not upon* allegata *only, but upon* allegata & probata.

If there be divers Rules of the Court made in a Cauſe, and the party intends to move upon theſe Rules, he muſt produce the Rule that was laſt made in

in the Cauſe, and move upon that. *Paſc.* 23. *Car. B. r.* *Yet it is neceſſary alſo to have all the Rules made in the Cauſe, to ſatisfie the Court how the Cauſe ſtands in Court, and how it hath been proceeded in from time to time, and how the Rules depend upon one another; but the laſt Rule is the moſt material.*

One party ought not to ſurpriſe another by a motion in Court, but he ought to move in ſuch convenient time, that the other party againſt whom the motion is made, may have time to be heard, and to make his Defence. *Paſc.* 23. *Car. B. r. And this the Court will grant.*

It is againſt the Rule of the practice of this Court to move matters in Law upon the laſt day of any Term, except it be where the caſe is peremptory, or of neceſſity to be moved then. *Paſc.* 23. *Car. B. r. Becauſe the other Party cannot have time to make his Defence by anſwering the motion, and that day is alſo a day appointed chiefly for motions, to prepare buſineſſes againſt the next Term to come.*

One ought not to move the Court for a Rule for a thing to be done, which may by the common Rules of practice of this Court be done without moving the Court for it, much leſs ought the Court to be moved for the doing of that which is againſt the common Rules of the practice of this Court. 24. *Car. B. r. For the Court is not to be troubled with, nor the Clyent put to the charge of needleſs motions, nor of motions not to be granted, and the former ſort of ſuch kind of motions do ſavour of ignorance, and the latter of too much preſumption; the former are to put the Court to needleſs trouble, and the latter are moved againſt the honour of the Court.*

When a thing queſtionable between the parties is

to

to be moved to the Court, for the ſetling thereof; he that intends to move it, muſt give the adverſe party timely notice of the ſame (as near as he can) when he will move it. *Mich.* 1650. *B. S. And upon what he intends to move, that he may be prepared to anſwer the motion at the time when he moves, for the quicker diſpatch of buſineſs, and for the ſaving of further charges.*

If a Rule of Court was grounded upon an *Affidavit*, he that will move the Court to make the Rule void, muſt when he moves produce the *Affidavit* in Court. *Hill.* 1649. 22. *Feb. B. S. That the Court may be informed upon what grounds the Rule was made, and whether there be cauſe ſhewed upon the motion, ſufficient to induce them to vacate the Rule.*

It is againſt the courſe of practice of the Court for any perſon to make a motion in his own Cauſe. 24. *Maii. Paſc.* 1650. *B. S. So ſaid in one* Thurſton *and* Maſons *Caſe*, viz. *for a Counſellour to do it; yet of latter times it hath been ſometimes ſuffered to be done.*

When the Court doth grant a thing to one upon a motion, which was in the power of the Court, either to grant, or not to grant it, the party that hath his motion ſo granted unto him, is by the Rules of the Court to pay 12d to the box for it all the Term till the laſt day thereof, and the laſt day he is to pay 2s. 1650. *B S. Which money is given to the Priſoners of the Kings Bench Priſon, as it is ſaid.*

It is not uſual to move for a Tryal at the Bar upon the laſt day of the Term. 2. *Julii.* 1650. *B. S. Nor for the Secondary to make a Report, nor for a Prohibition, nor to vacate a Judgment, or ſuch like caſes of diſpute, except both parties be in Court, and are contented with the motion, and prepared to ſpeak in it; and if*

ſuch

ſuch motions be made, the Court will make no Rule upon them.

The three laſt days of the Term, if it be not an Iſſuable Term, are appointed to hear motions only, & not other buſineſſes, except they be peremptory, or upon other ſpecial occaſions; But if it be not an Iſſuable Term, then the two laſt days are only for the hearing of motions; for in thoſe Terms there is leſs occaſion for motions then in Iſſue Terms. 30. *Jan.* 1650. *B. S. The Iſſue Terms are* Hillary-*Term, and* Trinity-*Term; and they are ſo called, becauſe though there be Iſſues joyned in every Term, yet not ſo many by much, as in theſe Terms, in regard of the Cauſes which are to be tryed (all* England *over) at the Aſſizes, which do follow in the next Vacations after the ſaid Terms, viz. the Lent-Aſſizes, and the Summer-Aſſizes, as they are commonly called.*

Motion.

In the Caſe of one *Topleſs verſ. Rag.* Hill. 1657. *It was ſaid that one ought not to move for ſeveral things in one motion, and therefore upon a motion that one in an Ejectment might be made party to defend his Title, and that he might alſo imparl to the next Term, the party was admitted to be made a party, and ordered to move again at another time for an imparlance.*

By *Glyn* Chief Juſtice, it is not the cuſtom of the practice of the Common Pleas for a Serjeant at Law, to move for a Clark of the Court, and afterwards for his Clyent. *Mich.* 1655. *B. S. For it ſeems it is not intended there, that he doth move without a Fee for a Clark of the Court, and therefore if he ſhould be ſo heard, he would have a double motion at one time, which no Court doth allow; but in this Court it is uſually done,*

done, ſo that it ſeems the Councel here are more civil to the Clarks of the Court, then they are in the Common Pleas.

Man-ſlaughter.

A Grand Jury may find a Bill of Man-ſlaughter to be *Billa vera per infortunium.* Paſc. 23. Car. B. r. Q.

Mortgage.

If Lands be Mortgaged to one, the intereſt in Law in theſe Lands is in the Mortgagee before the forfeiture of them. *Mich.* 23. *Car. B. r. For he hath purchaſed the Lands upon a valuable conſideration, as the Law will intend, and though the Mortgagee may redeem them, in reſpect of the agreement betwixt the parties, yet it is not known, whether he will do it, or no; For it is in his power to do it, or not to do it, and if he do it not, then the eſtate is abſolute in the Mortgagee without any other act to be done to paſs the Eſtate.*

Meſſuage.

One Meſſuage cannot be appurtenant unto another Meſſuage. *Paſc.* 24. *Car. B. r. For a Meſſuage is an entire thing of it ſelf, and therefore cannot be appurtenant to another thing; for that which appertains to another thing, may be ſaid to be part of it, and ſo not entire of it ſelf.*

Non-ſuite

Non-ſute.

UPon a Tryal, when the Jury comes in to deliver in their Verdict, and the Plaintiff is called to hear the Verdict; If he do not appear after he is thrice called by the Cryer of the Court, he is to be Non-ſute, and the Non-ſute is to be recorded by the Secondary, by the direction of the Court, at the prayer of the defendants Councel. *Hill.* 21. *Car. B. r. For the Court will not order it to be recorded, except the Councel pray it for the Clyent.*

When a Plaintiff is Non-ſute, if he will again proceed in the ſame Cauſe, he muſt put in a new Declaration, and cannot proceed upon that Declaration, whereupon he did proceed in the Cauſe, and wherein he became Non-ſute. 22. *Car. B. r.* 16. *Ap.* 1650. *B. S. For by his being Non-ſute, it ſhall be intended that he had no cauſe of Sute as he declared in, and ſo that declaration is void, and he hath no day in Court.*

The King of *Spain* hath been Non-ſuit in *England. Mich.* 22. *Car. B. r. And this ſtands with reaſon, for if a foraign Prince will take the benefit of the national Laws here, he muſt proceed and ſtand to the Rules and orders of the Court wherein he prefers his Action.*

If the Plaintiff will not proceed upon his Declaration, as he ought to do by the Rules of the Court, the Defendant may Non-ſuit him. *Mich.* 1649. *B. S. Q.*

Although upon a Tryal the Plaintiff be called to hear the Verdict, and do not appear to hear the Verdict when he is called, and thereupon the Court direct the Secondary to record the Non-ſuit; yet if afterwards the Plaintiff do appear, before the Non-ſuit be actually recorded, the Court may proceed to take the

the Verdict. *Trin.* 1651. *B. S. For it is not a Non-ſuit until it be recorded by the Secondary, and then it is made part of the record, and is in the nature of a Judgment againſt the Plaintiff.*

If the Plaintiff be not ready at the Tryal with his Record when the Jury is called, the Court may call him Non-ſuit. By *Rolle* Chief Juſtice. 1651. *B. S. For it ſhall be indended, he will not proceed in his cauſe any further, yet ſometimes the Court hath ſtayed a while in expectancy of his putting in his Record.*

Nolle Proſequi.

Upon part of a Record.

A *Nolle Proſequi* is, where there are divers Iſſues, or an Iſſue and Demurrer in one cauſe joyned between the Plaintiff and the Defendant, and the Plaintiff enters upon the Roll, a *Nolle Proſequi*; That is to ſay, that he will not proceed upon one or more of the Iſſues or Demurrer joyned, yet he may notwithſtanding ſuch Entries, proceed to Tryal upon the reſt of the Iſſues. *Hill.* 23. *Car. B. r. Or to argue the Demurrer.*

Nuſance.

A Nuſance made in a Port or Haven by the ſinking of a Ship there, ought to be removed by the owner of the Ship, and if he do it not, he may be indicted for it, as for making a common Nuſance. 21. *Car. B. r. For it is prejudicial to the Common-wealth in hindering of Navigation and Trade.*

An Action upon the Caſe ought to be brought againſt one that makes a private Nuſance, and he ought not to be endicted for it. *Paſc.* 23. *Car. B. r. For Endictments ought to be in the Kings name, and do preſume*

ſume to be preferred for offences done againſt the publick, and not for private injuries.

A common Nuſance may be abated or removed by thoſe perſons who are prejudiced by it. *Paſc.* 23. *Car. B. r. And they are not compellable to bring actions to remove them.*

Nomine Pœnæ.

A *Nomine Pœnæ* for the non-payment of a Rent, ought to be legally demanded, if the Rent be behind, as well as the Rent is to be demanded before the grantee of the Rent can diſtrain for it. 21. *Car. B. r. For the* Nomine Pœnæ *is of the ſame nature as the Rent is, and is iſſuing out of the Land, out of which the Rent doth Iſſue and ſavour of the realty.*

Notice.

The Plaintiff and Defendant are both bound at their peril, to take notice of the general Rules of practice of this Court; but if there be a ſpecial particular Rule of Court made for the Plaintiff, or for the Defendant, he for whom the Rule is made, ought to give Notice of this Rule unto the other; or elſe he is not bound generally to take notice of it, nor ſhall be in contempt of the Court, although he do not obey it. *Paſc.* 24. *Car. B. r. Mich.* 1649. *B. S. For general rules are the general practice of the Court, whereof every one muſt take Notice of that hath to do there; but particular rules are made upon particular and extraordinary matter, happening in the proceedings upon the motion of one of the parties made to the Court, of which the other may be ignorant, and therefore is to have notice of them given unto him.*

The

The Court is bound *Ex Officio* to take Notice of all matters which do appear upon the Record depending before them; but of matters *Debors, viz.* to ſearch the Almanack for days, and to compute times mentioned in the Record, they are not bound *Ex Officio* to do it. 21. *Car. B. r.* 24. *Car. B. r.* Q. Tamen.

The Court is not bound to take Notice of the new ſtile, but of the old Engliſh ſtile. 21. *Car. B. r. For the old is that whereby all accounts in the Common Law are guided, and not by the new which is Foraign, and goes ten days before the* Engliſh *ſtile or account; the old ſtile is called the* Julian *Account, and the new ſtile is called the* Gregorian; *the former was made in the time of* Julius Cæſar *the Emperour, the latter in the time of Pope* Gregory *the* 13.

The Plaintiff ought to give the Defendant eight days Notice *excluſive*, before he executes his Writ of Enquiry of Damages, ſo it is upon a *Niſi prius* Tryal in *London* or *Middleſex*, or elſe the Court will quaſh it, although he have executed it, and put him to a new Writ of Enquiry, or a new Tryal upon payment of the Defendants coſts, upon the motion of the Defendant made to the Court of his want of ſuch Notice, and proof thereof by Affidavit. *Trin.* 22. *Car. B. r.* and *Paſc.* 1652. *B. r. Excluſive is meant, that the day upon which the Notice is given, is not to be one of the eight days, but the Writ is to be executed upon the ninth day; and ſo long Notice is to be given that the Defendant may have time ſufficient to defend himſelf by his Counſel, and Witneſſes, upon the evidence given againſt him before the Sheriff and the Jury, by the Plaintiff.*

The Common Law doth not take Notice of the intentions of the party to do any unlawful Act, except

it be in caſe of high Treaſon. *Trin. 22. Car. B. r. For mans Law is to regulate the words and Actions of men, and not the thoughts, of which it cannot have conuſance: But* Gods *Law extends to the thoughts, and tends to the regulation of them alſo.*

This Court is to take Notice of a general Statute, *viz.* ſuch a one as concerns the publick; for that is for the time in the nature of a Law, but not of a particular Statute, which concerns ſome particular perſons only in their private intereſts. *Mich. 24. Car. B. r. Except ſuch particular Statute do appear before them by pleading or otherwiſe; for then it becomes matter of Record.*

If a Declaration be put into the Office, although it be not filed, yet is the Defendants Attorney bound to take notice of it. *Mich. 22. Car. B. r. For it is the Duty of the Plaintiffs Attorney, only to put the Declaration into the Office, and the Officer in the Office is to file it, and though it be not filed, yet may the Defendants Attorney take a Copy of it.*

None is bound by the Law to give Notice to another of that which that other perſon may otherwiſe inform himſelf of. *Mich. 22. Car. B. r. Except he tye himſelf by ſpecial covenant and agreement to do it; for the Law will not put an unneceſſary trouble upon any man without his own conſent.*

If one do commence an Action in this Court againſt another, and joins Iſſue, & yet doth not proceed to a tryal in his action, by the ſpace of a whole year, next after he began his Suit, he ought afterwards by the Rules of the Court, to give the Defendant one whole Terms Notice that he will try his cauſe, before he ptoceed to a tryal therein. *Mich. 22. Car. B. r. For his delay might give occaſion to the Defendant to conceive*

ceive that he intended to let his Action fall, and ſo to neglect to make proviſion for his Defence at the Tryal; and therefore it is but reaſon that he ſhould have more then ordinary Notice in an extraordinary caſe.

If Notice of Tryal be given in London or Middleſex, and not tryed that ſitting, the Plaintiff may try it the nert ſitting upon two days Notice, but if not tryed at the nert ſitting, then new Notice is to be given as at the firſt, viz. Eight days. Per Magiſtrum Liveſey, & al. &c. P. 21. Car. 2. Regis.

If a cauſe hath continued four Terms without proſecution before Iſſue joyned, the Defendant is to have a Terms Notice to plead, &c. before Judgment can be entred by default; if after Iſſue joyned, a Terms Notice of Tryal. Per Magiſtrum Liveſey, & al. &c. P. 21. Car. 2. Regis.

If Notice for a Tryal be given to the Defendant himſelf, or to his Attorney, this is a good Notice; but if Notice be given thereof to the Councel of the Defendant, it is not a good Notice. *Hill.* 22. *Car. B. r. For Councel are not bound to take Notice of ſuch a warning for a Tryal, nor to give the Clyent Notice thereof; And it may be though one have been formerly of Councel with the Defendant in other buſineſs, or in the cauſe to be tryed, yet he may not be of Councel at the tryal; nor is it the part of a Councellour to ſollicite his Clyents buſineſs, but to give Notice is to ſollicite.*

The Plaintiff and Defendant are both bound to take Notice of ſuch Rules of the Court as do concern the proceedings of their Cauſe, at their own perils.

Hill. 22. *Car. B. r. For if they know them not, yet they may inform themſelves by their Councel and Attornies. But this is only to be underſtood of the general Rules, and not of particular rules made upon the motion of either party, for of ſuch rules there ought to be Notice given to the party concerned by the other.* Paſc. 24. Car. B. r. *For whoſe advantage the Rule is made.*

When Councel are to argue a matter in Law in Court, the Judges ought to have Notice thereof given unto them before the day, except it be where the Court have appointed a ſet day for it, or if there be not ſuch Notice given, then the cauſe is to be put in the paper of cauſes, that it may come on in courſe to be ſpoken unto. *Paſc. 23. Car. B. r. And by putting it in the paper, the Judges have Notice, for they have a paper of the cauſes to be ſpoken to in matter of Law the day before they be ſpoken to by the Officer of the Court.*

The Officers in Court ought to take Notice of the proceedings of the cauſes depending in Court. *Paſc. 23. Car. B. r. For, for that cauſe do they ſit in Court.*

If the Plaintiff or his Attorney do give Notice unto the Sollicitor of the Defendant, that he intends to try his cauſe at ſuch a time, this is a good Notice of the Tryal, although it be not given unto the Defendant nor his Attorney. *Paſc. 23. Car. B. r. For it is the duty of the Sollicitor to inform his Clyent of it, and if he do it not, it ſhall be accounted the folly of the Clyent, to entertain a Sollicitor that is ſo careleſs in his buſineſs, and in this caſe there is no default in the Plaintiff.*

The Defendant ought to have eight days Notice

of

of the Tryal of the Plaintiffs cauſe before it be tryed, if he live twenty or thirty miles off from the place where the cauſe is to be tryed; but if he lives forty miles off or above, he ought to have fourteen days Notice before the Tryal. *Trin.* 23. *Car. B. r. That the Defendant may have convenient time for his journey, and to prepare his Councel and Witneſſes for his Tryal; and if due Notice be not given, the Court upon motion will grant a new Tryal, becauſe he was ſurpriſed in the Tryal for want of due Notice.*

The Plaintiff may if he pleaſe give the Defendant Notice when he intends to try his cauſe the ſame day that he hath joined Iſſue with the Defendant in the cauſe to be tryed betwixt them. *Trin.* 23. *Car. B. r. But this is not uſually done, but deferred till the uſual time of Notice enjoyned by the Court.*

If one be bound by the Rule of the Court, to give unto another perſonal Notice of a thing, it is not ſufficient that Notice be left at the dwelling houſe of the party. *Mich.* 23. *Car. B. r. For perſonal Notice is Notice given to the perſon of the party himſelf, and not to another, or at the dwelling houſe of the party; for Notice may be given there, and yet the party may not know it; and uſually where perſonal Notice is to be given for the party to do a thing, it is very penal to him if he do it not.*

It is not neceſſary for the Plaintiff to give new Notice of the tryal of his cauſe where a *retraxit* is entred; for this is but a forbearance to try his cauſe *hac vice*, and he may afterwards proceed notwithſtanding the *retraxit* was entred for that time. *Mich.* 23. *Car. B. r. The entring of a* retraxit *is when the Plaintiff after he hath entred his cauſe to be tryed, and hath put in his Record, doth make an entry in the Judges book, that he*

hath withdrawn his Record, and intends not then to proceed to his tryal; the word comes of the word retrahere, *to withdraw or draw back.*

It is ſufficient upon an Action of Treſpaſs and Ejectment brought to try the title of Land, if the Tenant in poſſeſſion of the Land, have Notice of the Leaſe of Ejectment, although he be but an under Tenant of the Land, and although no Notice thereof is given to the upper Tenant or to the owner of the Land whoſe title is concerned. *Hill.* 23. *Car. B. r.* & *Paſc.* 24. *Car. B. r. For the poſſeſſion of the Land is only recoverable in this Action, and that doth chiefly concern the Tenant in poſſeſſion of it; and it is he properly in Law that is to defend the Title.*

A Clerk of Commiſſioners of Sewers is ſuch a Clerk as the Law takes Notice of. *Hill.* 23. *Car. B. r. For he is an Officer appointed by Act of Parliament.* Q. Vid. *the Statute.*

If the Panel of the Jury Impanelled to try a cauſe, be returned, and be afterward altered or changed before the tryal, the other party ought to have Notice of it, otherwiſe it is a ſurprizal of the party. *Paſc.* 24. *Car. B. r. For he may not by that means be prepared for his challenges, nor to prove them.*

If the Plaintiff give Notice to the Defendant for a Tryal, and there is no Jury returned to try the cauſe, ſo that the cauſe cannot be tryed at the day appointed, if the Plaintiff will afterwards try his cauſe, he muſt give the Defendant new Notice of this Tryal, *Paſc.* 24. *Car. B. r. Elſe the Defendant cannot be able to know againſt what time he muſt attend to make his defence; and there was no default in him that the Jury did not appear.*

If the Plaintiff give but eight days Notice of a tryal

al unto the Defendant, where by the rules of the Court he ought to have given him fourteen days Notice thereof, yet he may enlarge the eight days unto fourteen days after the Notice of eight days given. By *Hodſden* Secondary. *Trin.* 24. *Car. B. r. For it is all one as if he had at the firſt fourteen days Notice, ſo the the enlargement be given Notice of in convenient time.*

By the courſe of the Court, the Defendant ought to have convenient Notice of the executing of a Writ of Enquiry of Damages, before it be executed, as well upon a judgment given upon a Demurrer as upon a Verdict. *Trin.* 24. *Car. B. r. That he may prepare to give evidence to the Jury that are to inquire of the Damages, for the mitigation of them.*

This Court is not bound to take notice of Orders made, and of things which are done at the Aſſizes, although it be by a Judge of this Court, becauſe he acts not here as a Judge of this Court. *Mich.* 24. *Car. B. r. For the Juſtices of Aſſize,* &c. *do Act by ſpecial Commiſſions, and not as Judges of the Common Law of any of the Courts at* Weſtminſter; *but the manner is upon an Order made at the Aſſizes, to get it drawn up by the Clerk of the Aſſizes, and to move the Court the next Term to have it made a rule of Court, and then both parties ſhall be bound by it.*

When either the Plaintiff or Defendant doth intend to move the Court in any matter wch may prove diſputable, the party that thus intends to move, ought to give notice to the other party, that he doth intend to move the Court in it, and to expreſs for what he will move, and when. *Mich.* 1650. *B. S. That he againſt whom the motion is to be made, may not be ſurprized, but may have time to provide, and may attend the Court to defend himſelf and anſwer the motion,*

which the Court will give him time to do, ſo that if ſuch notice be not given him, the motion will be to no purpoſe as to the deciding of the difference in queſtion.

If the Plaintiff doth tell the Defendant that he will try his cauſe the firſt ſitting in the next Term, this is a good Notice given of the Tryal, although he do not expreſly ſay upon what day of the month or week it is. *Mich.* 1649. *B. S. For the Defendant may inform himſelf of the preciſe day when that ſitting will be, although the Plaintiff do not expreſs it, and it may be he did not know it himſelf when he gave the Notice.*

In the Common Pleas in an Action of Treſpaſs and Ejectment, if there be not Notice given to the Tenant in poſſeſſion of the Land in queſtion, who is the Ejector in the Action, they will not ſuffer the Plaintiff to proceed to a Tryal upon ſuch a Leaſe. *Mich.* 1649. *B. S. This I conceive is for the better recovering of Coſts, in caſe the Plaintiff be Non-ſuit, and it is but reaſonable it ſhould be ſo.*

If the Plaintiff do give unto the Defendant notice for a Tryal, before Iſſue is joyned in the Cauſe, this is no good notice. *Hill.* 1649. 5. *Feb. B. S. For before Iſſue joyned, there is nothing to be tryed, and ſo this is a vain Notice, and to no purpoſe, and it may be there will never be any Iſſue or Tryal, and ſo the party, if he ſhould attend upon ſuch Notice, might loſe his pains and coſts.*

If the Plaintiff carry down his Cauſe to be Tryed at the Aſſizes, and it be not then Tryed for want of time, and doth bring it down again at the next Aſſizes to Try it, he is not bound to give the Defendant new Notice of this Tryal; but if he do not bring it down

down to be Tryed at the next Aſſizes, and yet will try it at another Aſſizes after that, he muſt give the Defendant new Notice before he Try it. *Paſc.* 1650. *Paſc.* 1656. *Between* Askue *and* Landye. 6. *Miii. B. S. For the Defendant may doubt whether he will try it or no, having deſiſted ſo long from Trying it, and ſo might be ſurprized, if he ſhould not have new Notice of the Tryal, or elſe be put to needleſs trouble and charge in attending, in caſe he ſhould not try it; but to avoid trouble, I would adviſe all perſons to give new Notice, if it may conveniently be done.*

The party that intends to move the Court in a queſtionable matter, ought to give Notice thereof to the party againſt whom he intends to move, or to his Attorney or Sollicitor, and not to his Councel, for ſuch Notice is not good. 3. *Julii.* 1650. *B. S. For the Councel is not concerned to take Notice of any thing, but from his Clyent, nor bound to ſeek out his Clyent to give him Notice.*

It is a ſufficient Notice for the Plaintiffs Attorney to tell the Defendants Attorney that he hath put in a Declaration into the Office againſt his Clyent, and he is not bound to give him a Copy of it. 13. *Nov.* 1650. *B. S. For there he may take a Copy of it, but uſually they do deliver Copies to one another of the Declarations and Pleadings in their Clyents Cauſes, and it is very rarely omitted, ſo that now the Attornies do expect it.*

If the Aſſizes that are to be held for that County where an Iſſue is to be Tryed do fall out to be fourteen days after the end of that Term, wherein the Iſſue was joyned, It is not neceſſary to give fourteen days Notice before the Tryal that the Plaintiff will try his Cauſe at that Aſſizes, although the Defendant

do

do dwell above forty miles from the place where the Aſſizes are to be held. 22. *April.* 1650. *B. S. For the Defendant knows the Tryal by the uſual courſe, is to be at that Aſſizes, and muſt attend there at his peril, whether the Plaintiff will try his cauſe or no.*

If one be bound by an *Aſſumpſit* generally to do a thing to another, he to whom the promiſe is made muſt give him notice when he will have him to do it, becauſe it is in his election when he will have it done; but if he promiſe that another perſon ſhall do it to him, there he to whom the thing is to be done, is not bound to give notice to that other perſon when he will have it done. 13. *Maii.* 1651. *Paſc. B. r. For it may be he may not know that other perſon, and there is no privity of Contract between them two, as there is betwixt the other two.*

After a *ne recipiatur* is entred into the Judges Book, ſo that the cauſe cannot be Tryed at that time, if the Plaintiff will try his Cauſe afterwards at another time, according to fair practice, he ought to give the Defendant new notice before his Tryal; but in ſtrictneſs of practice, he is not bound to give new notice of it, for the firſt notice is to ſerve for all that Term, and a *ne recipiatur* ſerves only to hinder the Tryal for that day, whereon it was ſet down in the Judges Book to be Tryed, and it may be the Plaintiff would have Tryed it at that day, had not the *ne recipiatur* been entred to hinder him. *Trin.* 1651. *B. S. This is to be underſtood of Cauſes that are to be Tryed by the Judges every Term, and ſome days after the Term in* London *and* Middleſex, *and not of Cauſes to be Tryed at the Aſſizes.*

One is not bound to give notice to another of a Rule of Court made againſt him, except part of the Rule

Rule be, that notice ſhall be given unto him of the Rule. *Trin.* 1651. *B. S. For it is intended that his Attorney or Solliciter was in Court when it was made, and that he did take notice of it from them, or elſe that there needs no notice in the Caſe, becauſe that the party ought to have done that which he was ordered to do, without the Rule made in the Caſe.* Q.

If a Cauſe be ready for Tryal, and notice is thereupon given of the Tryal, and afterwards the Cauſe is put to a reference, and doth depend two or three Terms under reference, but cannot be determined by the Arbitrators, if the Plaintiff intends to proceed to a Tryal, there he muſt give the Defendant new notice; but if ſuch Tryal be to be the next Term after the reference, it is not neceſſary to give new Notice of it, for the Defendant may try it by Proviſo if the Plaintiff do it not. *Trin.* 1652. *B. S.*

If one give Notice of a Tryal to the Defendant, and yet doth not try his Cauſe at the day appointed, but do defer his Tryal for longer time then one Term after, If after that he will try it, he muſt give a whole Terms notice before his Tryal; but if he try it the next Term after, there needs no new notice; For if the Plaintiff try it not, then the Defendant may try it by proviſo. *Trin.* 1652. *B. S.*

If an Action be laid in *London*, and the Defendant do live fifty miles off, the Plaintiff by the Rules of the Court ought to give the Defendant fourteen days notice of the Tryal before he proceed to it. *By* Rolle *Chief Juſtice. For in regard of the diſtance of place, it is fit he ſhould have time for his travel and witneſſes, and to prepare for his Defence.*

If the Defendant will try the Cauſe by proviſo, he ought to give the Plaintiff due notice that he will

try

try it, and may not take advantage of the Notice formerly given by the Plaintiff. 1654. *B. S. Becauſe it lies in the Election of the Defendant, either to try the Cauſe by Proviſo, or not to try it: And the Plaintiff cannot preſume he will try it, being Defendant in the Action, except the Defendant give him Notice that he will try it.*

If one give Notice to another, that he will move the Court in one thing, and tell him in what; and at the time he moves the Court in another matter, and not in that whereof he gave Notice that he would move the Court in, This is not good Notice of the motion, but the Court will give the party further time to anſwer the motion. *By* Rolle *Chief Juſtice. For by ſuch deceitful Notice the party concerned cannot prepare to anſwer the motion, and ſuch Notice is accounted no Notice.*

Notice given to the party concerned by the Councel in the Cauſe, that he intends to move the Court againſt him at ſuch a time, is not to be taken by the Court for good Notice, upon the bare averment of the Councel at the Bar, that he gave ſuch Notice; but if the Councel will make *Affidavit* in writing, that he gave ſuch Notice, the Court will allow it, for then he ſpeaks as a Witneſs in the Cauſe, and not as a Councellour,

This Court is not bound *ex officio* to take Notice of private Orders made at the Councel Table. *By* Rolle *Chief Juſtice. For they are matters but of particular concernment, and not matters of Law or publick buſineſſes, whereof as Judges, they are to take Notice.*

Notice.

Notice.

In the Caſe of *King* and *King*. *Paſc.* 1659. *By the Court held, that if the Plaintiff do give wrong Notice of a Tryal, and after that gives a right Notice, but not timely enough, according to the Rules of the Court, this is no good Notice, for the firſt Notice is not taken for any Notice.*

Notice given in the night of a Robbery by the party robbed, with an intent that Hue and Cry ſhould be made after the Felons, is good Notice according to the Statute, if it be given in convenient time after the the robbery was done. *By* Rolle *Chief Juſtice. For it may be it could not be given ſooner.*

It is not neceſſary to give Notice of a Robbery to the Vill that is next within the Hundred, where the robbery was done, and unto that place where it was done: For if the next Vill be out of the Hundred, yet Notice given there is good Notice, according to the Statute of *Wincheſter*. Vid. *The Statute.*

Non Omittas.

If the Bailiff of a Liberty do not return a Warrant (made upon a Latitat out of this Court, to Arreſt one within the Liberty) directed unto him, the party that is prejudiced by his not making a return of it, may by the courſe of this Court have a Writ called a *Non omittas* directed to the Sheriff of the County, in which the Liberty lies, commanding him to enter into the Liberty, and to make Execution of the Writ, *viz.* the Latitat. 21. *Car. B. r. For Liberties*

berties muſt not be priviledged to hinder or delay the general Execution of Juſtice; and if they or their Miniſters do neglect their duties herein, this Court, as the Supreme Court, may intermeddle, notwithſtanding their priviledges, to put the proceſs of this Court in Execution, that the Law may receive no obſtruction by them.

Negative preignant.

A *Negative preignant* is, when two matters are put in Iſſue in one Plea. *Hill.* 23. *Car. B. r. And this makes the Plea to be naught, becauſe the Plaintiff cannot tell in which of theſe matters to joyn Iſſue with the Defendant, for the incertainty upon which of the matters the Plaintiff doth inſiſt upon; and ſo it is not ſafe for the Plaintiff to proceed upon it.*

Oath.

OFficers of Juſtice are by the Common Law bound to take an Oath for their due Execution of Juſtice, and if they refuſe to take ſuch an Oath, they may be impriſoned for refuſing to take it. *Trin.* 22. *Car. B. r. So careful is the Law to have Juſtice done to all parties.* Q. *What Officers.*

One that is to teſtifie on the behalf of the King upon an Arraignment of a Felon, cannot be examined upon his Oath for the Priſoner againſt the King, but he may be examined without giving him his Oath. Q. *Rationem inde,* It ſeems it is becauſe he hath taken his Oath already to teſtifie his whole knowledge concerning the matter in queſtion, and ſo a ſecond

cond Oath is needleſs. *Mich.* 22. *Car. B. r. He is ſuffered to give his teſtimony for the Priſoner againſt the King, without his Oath in favour of life.*

By *Glyn* Chief Juſtice. *Trin.* 1656. *B. S. If Oath be made againſt Oath in a Cauſe depending in Court, this is a* non liquet *to the Court; which Oath is true, and there the Court will take that Oath to be true, which is to affirm a Verdict, Judgment, or other Act of the Court, and not that which is made to deſtroy them; for this tends more to the honour of the Court and to the expediting of Juſtice.*

The Court will rather believe the Oath of the Plaintiff, than the Oath of the Defendant, if there be Oath againſt Oath; becauſe it is ſuppoſed that the Plaintiff hath wrong done him, and that the Defendant is the wrong doer, and may therefore be rather ſuppoſed to ſwear falſly to protect himſelf from the Juſtice of the Law, than the Plaintiff that is forced to flie to the Law to obtain his right. *Paſc.* 23. *Car. B. r.*

One that is to be a Witneſs in a Cauſe, may have two Oaths given him, one to ſpeak the truth to ſuch things as the Court ſhall ask him concerning himſelf, or other things which are not evidence in the Cauſe, and the other to give teſtimony in the Cauſe, in which he is produced as a Witneſs. The former is called an Oath upon a *Voyre dire*, to ſpeak the truth. *Paſc.* 23. *Car. B. r.*

Obligation.

One ought not to be admitted to be a Witneſs to prove an Obligation or other Deed, which he takes in the name of another. 21. *Car. B. r. For if he might*

might be ſo admitted, this would be upon the matter to ſuffer him to be a Witneſs to prove a Bond or Deed made to himſelf, which is not reaſonable; for every man is ſuppoſed to be partial to himſelf.

If a Sheriff take a Bond of the Defendant for his appearance to the Action, upon which he is arreſted by him at the Plaintiffs ſute, and the Defendant doth not appear accordingly, and according to the Condition of the Bond, the Plaintiff may by the leave of the Sheriff ſue this Bond in the Sheriffs name, and proceed to Judgment upon it againſt the Defendant; but without his leave it cannot be done, but it is at the Election of the Plaintiff to ſue this Bond or not, for he may proceed if he pleaſe by amercements upon the Sheriff, until he make a return of the Writ directed unto him. *Hill. 22. Car. B. r. For the Bond is only to ſave the Sheriff harmleſs againſt what may befall him, if the Defendant do not appear, and doth no way concern the Plaintiff, but by agreement made afterwards betwixt the Plaintiff and him, of which the Court doth not take notice, except they be moved in it.*

An Obligation cannot be delivered as an eſcrow unto the Obligee himſelf, but it may be delivered to another to the uſe of the Obligee, as an eſcrow. *Trin. 24. Car. B. r. For the very delivery of it to the Obligee himſelf, and his receiving it makes it work a Deed in the very inſtant of the delivery of it, according to the effect of the Deed; but being delivered to another to the uſe of the Obligee, it cannot operate ſo, becauſe he is no party to the Deed, nor can take any thing by it, and doth but only take it, as an eſcrow, and as an inſtrument to deliver it to the Obligee at ſuch time, and in ſuch manner as the Obligor ſhall direct,*

and

and if he deliver it otherwiſe, the Obligor may plead non eſt factum, *if he be ſued upon it by the Obligee, for the Deed ſhall not be conſtrued to work otherwiſe then he whoſe Deed it was did intend it ſhould.*

If one be bound unto *J. S.* in an Obligation of Twenty pound to be paid unto *J. D.* this Obligation is not good. *Trin.* 24. *Car. B. r. For to* J. S. *it cannot be good, for the Obligor is not bound to pay him the twenty pound in which he is bound, for the* ſolvendum *is to* J. D. *and to* J. D. *it cannot be good, for if he pay him not the twenty pound, he cannot ſue for it: For the Obligor is not bound unto him by the Obligation, and ſo the Obligation is void to all intents; and where a Deed can have no Operation in Law, it is utterly void, and it is as if no ſuch Deed had been made.* Sed Q.

If money be not paid according to the Condition of an Obligation, the Obligation doth thereby become a ſingle Obligation, that is, it ſhall be taken as an Obligation without a Condition; for the benefit of the Condition, which the Obligor might have taken advantage of by the payment of the money according to the Condition, is loſt by the not paying of it, and ſo it is deſtroyed, and the Obligation reſts in force, as if it had no Condition annexed to it. *Mich.* 24. *Car. B. r.*

An Obligation is a good Obligation, although it do a want a date. *Hill.* 1649. *B. S.* 8. *Feb. For the date is not of the Eſſence of the Deed, but the ſealing and delivery of it: For if the ſealing and delivery of it be proved, although the time preciſely of the doing it cannot be proved, yet it is a good Deed; yet the date of a Deed may be very material in ſome Caſes.*

Orders.

This Court may quaſh any Orders made at any publick or private Seſſions of the Peace, or made by any other Commiſſioners, if they ſee good cauſe for it. *Mich.* 22. *Car. B. r. For this Court is the ſuper-intendent Court over all other Courts, and is to regulate their proceedings, where they be irregular and illegal.*

If a Cauſe be put in the paper of Cauſes, that it may be ſpoken unto in matter of Law by the Order of the Court, and the Attorney in the Cauſe doth not attend the Cauſe at the day, the Cauſe is to be put out of the paper, and not to be put in again that Term. *Mich.* 22. *Car. B. r. Except very good cauſe be ſhewed to the contrary.*

This Court doth not take notice of Orders made in Chancery. *Trin.* 23. *Car. B. r. Nor in any other Court, as to be bound by them, but will proceed according to the Rules and Orders of this Court; and if they ſhould do otherwiſe, their proceeding would be thereby much interrupted to the prejudice of the people.*

By the Orders of this Court (the three laſt days of the Term) the Judges have no paper of Cauſes, either of *Records* or *Conciliums* delivered unto them, for thoſe three days are to hear motions. *Trin.* 23. *Car. B. r. That is, the three laſt days of* Hillary *Term, and* Trinity *Term, which are Iſſue Terms: for the two laſt days only of* Michaelmas *Term, and of* Eaſter *Term, which are not Iſſue Terms, are for motions.*

Tueſdays, Thurſdays, and Saturdays are the proper days by the Orders of this Court to hear matters of Law. *Mich.* 1649. *B. S. But every Saturday;*

the

the other three days are proper for motions and other buſineſſes; but this doth not always hold.

Outlawry.

The Court will not reverſe an Outlawry, although both the parties conſent to it, *viz.* the party Outlawed, and the party at whoſe ſute he is Outlawed, except there be error aſſigned in the Outlawry. *Mich.* 22. *Car. B. r. For matters of Record are not to be deſtroyed without ſufficient cauſe, and the Outlawry alſo doth concern the King as well as the Parties, and therefore not to be overthrown without cauſe.*

An Outlawry which is grounded upon an Endictment grounded upon the Statute againſt forcible entries, preferred againſt divers perſons, may be reverſed as to ſome of the parties endicted, and yet may ſtand good, as to others that are Outlawed upon the ſame endictment. *Hill.* 22. *Car. B. r. For the Outlawries againſt them are ſeveral and not entire, and the proceedings to the Outlawry may be good as to the Outlawing of ſome of them, and the proceedings to the Outlawry as to others, may not be good.*

An Outlawry that doth not expreſs that the party Outlawed was proclaimed, as he ought to be, is not good, but may be reverſed. *Trin.* 23. *Car. B. r. Becauſe it is defective in matter of ſubſtance.*

If the Defendant do not appear upon the *quinto exactus* made by the Sheriff of the County at his County-Court, in the County where the Defendant doth dwell, then he is outlawed by the Coroner. *Paſc.* 1650. 22. *Matt. B. S. For the Coroner is the chief Officer in criminal matters in the County.*

Office and Officer.

The chief Cryer of this Court hath his Office by Patent from the King; and this Office may be granted in reverſion. *Paſc.* 23. *Car. B. r. For this Court is the Kings own proper Court, where himſelf uſed to ſit in perſon, and it is for his honour to have ſuch Officers by Patent, who are upon the matter to attend his own Perſon, and not to leave ſuch places to be diſpoſed of* ad placitum, *and it may be granted in reverſion, becauſe it is but a miniſterial place.*

The Office of Aſſurance cannot aſſure the life of one that hath an Office for his life, as it may do the life of one that is at Sea, or beyond Seas, and imployed in Merchants affairs. *Mich.* 1649. *B. S. For they have no power to aſſure the life of any, but in caſe of Merchants affairs, by the Statute which gave them their power, which is the Statute of* 43. Eliz.

Oyer of a Deed, &c. *v. 376. 180*

and 180. 181 If one be ſued upon an Obligation, he may pray *Oyer* of the Obligation, and before he hath *Oyer* of it, he is not bound to plead to the Plaintiffs Declaration; yet he may plead without *Oyer* of it, if he pleaſe: for he may take upon him to remember it without hearing it: But if he do plead without *Oyer* of it, he cannot after his pleading wave his Plea, and demand *Oyer* of it. 18. *April.* 1650. *B. r. To demand* Oyer *of the Obligation, is not only for the Defendants Attorney to deſire the Plaintiffs Attorney to read the Obligation unto him, as the word* Oyer *ſeems to import, or to have a ſight of it, but that he may have a Copy of it,*

poſt 417

it, that his Clyent may conſider by it what to plead to the Action.

Paper Book.

IN all ſpecial Pleadings where the Plaintiff takes Iſſue upon the Defendants Pleadings, or Traverſeth the ſame, or demurreth ſo as the Defendant is not thereby let in to alledge any new matter, there he may make up the Paper Book without giving a Rule with the Secondary to rejoyn, &c. and if the Defendant doth not in four days after the Paper Book delibered, prȳbided the ſame be delibered in time, bȳing back the Paper Book, and join Iſſue or Demur, or give a general Iſſue, Judgment may be entred by default. Per Magiſtrum Liveſey, & al. &c. P. 21. Car. 2. Regis.

Pleas and Pleadings.

If an Action be grounded upon a Statute, there the Statute muſt be preciſely ſet forth: but if a Statute recited be but an inducement to the action, there it is not neceſſary to recite the Statute preciſely. *Hill.* 21. *Car. B. r. For if the Statute be not preciſely recited, where the Action is grounded upon the Statute, the Defendant cannot tell how to plead to the Statute; but if the Statute be alledged but by way of inducement, the pleading hath no dependance upon the Statute, and therefore there needs no ſuch preciſe recital.*

As a Plea in bar may go *per partes*, ſo may in like manner a Plea pleaded in abatement of a Writ. *Hill.* 21. *Car. B. r. A Plea is then ſaid to go* per partes, *as*

I conceive, when one part of it goes to one part of the Declaration, and another part of the Plea anſwers another part of the Declaration; for a Writ may be naught in ſeveral parts of it, as well as a Declaration may be.

One that appears in Court upon a *Habeas Corpus*, ought to plead the ſame Term wherein he comes in, *Hill.* 21. *Car. B. r. In regard of the delay and extraordinary charge the Plaintiff hath been put unto by ſo bringing him in.*

If the Defendant doth not plead according to the Rules of the Court, ſo that the Plaintiff may enter Judgment upon a *Nihil dicit*, yet if after the Rules are out the Defendant do put in his Plea into the Office before the Plaintiff hath entred his Judgment, this Plea is to be accepted, and the Plaintiff ought not then to enter his Judgment; and therefore it behoves Attornies to be vigilant in their practice. 21. *Car. B. r. and* 23. *Car. Hill. For a Judgment upon a* Nihil dicit *is for want of a Plea; but in this Caſe here is a Plea, and if ſuch a Judgment ſhould be entred, it would be* in facto, *a falſe and an irregular Judgment; and therefore the Court will not ſuffer him to enter it.*

It was ſaid, *By* Glyn *Chief Juſtice. Trin.* 1657. *That if one be ſued in an Action of Treſpaſs and Ejectment by Original, he needeth not to plead until the Original be ſhewed him.*

If the Defendant in an *Ejectione firmæ* do not plead in time, according to the Rules of the Court, the Plaintiff may after the Rules for pleading be out, move the Court to ſet a ſhort day for him to plead, which will be granted, if the Land lye near at hand, and if the Defendant do not plead at the time ſet by the

the Court, the Plaintiff may enter Judgment upon a *Nihil dicit.* 21. *Car.* B. r.

A foraign Plea is to be put in upon Oath of the Defendant, that is, he muſt ſwear his Plea is true, or elſe ſuch a Plea is not to be received. *Mich.* 22. *Car.* B. r. *Mich.* 24. *Car.* B. r. *Becauſe thereby he endeavours to out this Court of its juriſdiction.* *R. St. Rep. 451*

A foraign Plea is when the Defendant doth plead ſuch matter, that if it be true, the cauſe cannot be tryed in this Court; and in regard that thereby the Defendant doth endeavour to hinder the proceedings of this Court, and to delay the Plaintiff, therefore the Court will make him ſwear his Plea to be true, that the Court may not be deluded, nor the Plaintiff trifled with by a falſe Plea; and if he will not ſwear his Plea to be true, the Plaintiff may enter Judgment for want of a Plea. *Trin.* 1650. B. S.

If an Action of debt be brought upon an erroneous Judgment, the Defendant may plead, *Nul tiel Record*, that is, that there is no ſuch Record, as he frames his Action upon. *Mich.* 22. *Car.* B. r. *For that which is erroneous, is accounted in Law as null and void.* Q. Tamen; *for it may not appear to be erroneous until it be diſputed.*

If the Defendant do plead a dilatory Plea, the Court at the Plaintiffs motion will order him to plead ſuch a Plea, as he will ſtand to. *Mich.* 22. *Car.* B. r. *For the Law favours not delays, whatſoever is vainly babled by the ignorant to the contrary. And if he be ordered to put in a Plea, to which he will ſtand, and he do it accordingly, if ſuch his Plea be not good, the Court will not permit him to amend it, but the Plaintiff ſhall take advantage of it by demurring upon*

it, or otherwiſe as he ſhall be adviſed; becauſe he hath abuſed the favour of the Court in granting him time to put in his Plea, which they intended ſhould be a good Plea.

In any Action wherein the Plaintiff, in caſe he recover, ſhall only recover Damages, the Defendant may plead in bar to this Action an arbitrement with ſatisfaction thereupon made unto the Plaintiff, although the ſatisfaction given by the Arbitrators, was leſs then the Plaintiff ſuffered by the Defendant; for it was his own act to refer himſelf to the Arbitration *Mich. 22. Car. B. r. And if the Plaintiff have ſatisfaction, the Law will not intend that he is damnified, and ſo he hath no Cauſe of Action.*

When the Court doth order one to plead preſently, it is to be underſtood that he ſhall plead in ſuch convenient time after, as the Court ſhall judge reaſonable. *Mich. 22. Car. B. r. For the Law accounteth things which are done in convenient time, to be done without delay.*

The Defendant may amend his Plea, although it be three Terms after it was pleaded, if he will pay Coſts. *Mich. 22. Car. B. r. But it muſt be by leave of the Court, becauſe it is againſt the common Rules of practice, which they will grant if there be cauſe for it.*

Although a Plea do contain divers matters in it, upon which an Iſſue may be taken, yet this Plea is not double, if the Plea could not have been good, that is, would not have anſwered the whole Declaration without alledging all thoſe matters in it. *Mich. 22. Car. B. r. For though the Law doth not allow capcious Pleas, yet it doth not deny the Defendant to plead all ſuch matters that his Caſe affords for his juſt Defence.*

If

If the Defendant plead an inſufficient Plea, and there is Iſſue joyned upon that Plea, and a Verdict given upon that Iſſue for the Defendant; the Plaintiff ſhall not afterwards take advantage of the inſufficiency of the Plea. *Mich.* 22. *Car. B. r. For it was his own fault to joyn Iſſue upon it when he might have demurred upon it, and then the Court would have given judgment for him upon the Demurrer.*

Where one Pleads Letters of Adminiſtration, which are granted by ſuch an ordinary, whereof the Law doth take notice, he may plead that they were granted unto him, *debita legis forma conuſſa ſint*; but if they be granted by an inferior ordinary, of whom the Law doth not take notice of, he muſt plead that they were granted unto him *per ordinarium illius loci.* Mich. 22. Car. B. r. *That the Court may the better judge whether they be well granted in regard of the power of the ordinary that granted them or not; which they may the better do, when it appears by what ordinary they were granted.*

If the Plaintiff do alter his Declaration after the Defendant hath pleaded to it; the Defendant may alter his Plea. *Mich.* 22. *Car. B. r. For by the amendment of it, it may be ſo altered in matter that it may require a different anſwer from what was formerly Pleaded, and in that caſe if he ſhould not amend his Plea, he might be triced for want of a good Plea.*

In an Appeal brought, all the pleadings are in Latin, but the Councel ought to Court in *French*, as in real Actions in the Common Pleas. *Mich.* 22. *Car. B. r. Becauſe the Statute which Enacted that all Pleadings ſhould be in Latin, did not extend to this Action, and therefore the Pleadings are to be in* French, *as they were before the making of that Statute.*

When

When the Court doth order that the Defendant ſhall plead, it is intended that he muſt plead an Iſſuable Plea. *Mich. 22. Car. B. r. For the Rule is made to quicken the Defendant, that the Plaintiff be not delayed by his Dilatorineſs, and if he might Plead a Dilatory Plea, and not Iſſuable, the Rule would be to no purpoſe for the Plaintiffs benefit, but rather for his diſadvantage to his greater delay.*

The Court will not upon a motion, rule the Defendant to plead peremptorily by a day, before the common Rules of the Court for Pleading be out, but then they will. *Mich. 22. Car. B. r. For till then it cannot be ſaid that the Defendant hath delayed the Plaintiff, and ſuch Rule is not to be made but where it appears to the Court that the Plaintiff is delayed for want of a Plea.*

If a *Scire facias* upon a Recognizance, be brought againſt an Infant, he cannot Plead Infancy or Non-age to it; for a Recognizance is in the nature of a Judgment, and the *Scire facias* is grounded upon it; but he muſt bring his *audita querela*, and ſet forth his caſe therein, and thereby his age ſhall be tryed by the Court inſpecting of him, and by proof of Witneſſes, and not by a Jury. *Hill. 22. Car. B. r. For there is no evidence to be given on both ſides, but only a matter of Fact in the Affirmative to be proved on the Infants part.*

If the Plaintiff do releaſe his cauſe of Action to the Defendant, yet the Court will not upon a motion ſtop the Plaintiffs proceedings in the Action, but the Defendant muſt Plead this releaſe. *Hill. 22. Car. B. r. In bar of the Action, for the Court cannot take notice of the releaſe, which is a private Act upon a motion, but by Pleading it, it will appear unto the Court upon Record.*

Alſo

Alſo the releaſe is matter of fact, which is properly tryable by a Jury.

It is not a good Plea, to Plead a Paroll agreement in bar of an Agreement made by Indenture between the parties. *Hill* 22. *Car. B. r. For an Agreement by Indenture is a more ſolemn Agreement, and of a higher nature then a Paroll Agreement, and muſt be diſcharged by ſome act of as high a nature as it is, as the Rule is,* Eodem modo quo oritur, eodem modo diſſolvitur.

A double Plea is ſuch a Plea, that one Iſſue cannot determine all the matter iſſuable that is contained in it, and alſo where the Defendant is put to a double anſwer. *Hill.* 22. *Car. B. r. And ſuch a Plea is not a good Plea, becauſe a good Iſſue cannot be joyned upon it with a ſingle Iſſue, becauſe where there is double matter, no certain Iſſue can be taken, which is clearly contrary to the nature of an Iſſue, for an Iſſue ought to be ſingle, and to be taken upon one ſingle point.*

If the Defendant do Plead a frivolous Plea, to the intent to delay the Plaintiff, and to hinder him from going to a Tryal, the Court will upon the Plaintiffs motion, order the Defendant to Plead ſuch a Plea as he will ſtand to, or elſe to accept of a Demurrer from the Plaintiff unto his frivolous Plea. *Hill.* 22. *Car. B. r. For it is the Juſtice of the Court to ſpeed the proceedings in Law, and to bring ſuits to determination as ſoon as with conveniency and Juſtice to all parties, it may be done.*

If a Cauſe have continued four Terms without Proſecution before Iſſue joyned, the Defendant is to have a Terms Notice to Plead, &c. before Judgment can be entred by default; if after Iſſue joyned, a Terms notice before the Tryal. Per Magiſtrum

ſtrum Liveſey, & al. &c. P. 21. Car. 2. Regis.

Where the Defendant may Plead the general Iſſue, he ought ſo to Plead, that the whole matter in queſtion may come to be tryed. *Paſc. 23. Car. B. r. For elſe the Plea is not good, becauſe it tenders not ſuch an Iſſue whereupon the Cauſe depending may be determined; which every Plea ought to do, for to Plead otherways, is to no purpoſe; And if the Defendants Plea doth not anſwer the Plaintiffs whole Declaration, the Plaintiff may well demur.*

If one bring an Action upon a Contract, it is a good Plea in Bar for the Defendant to Plead, *quod exoneravit ſe de Contractu.* Paſc. 23. Car. B. r. *For it ſounds all one, as if he had Pleaded that he hath performed the Agreement; for it ſhall be intended he hath legally diſcharged himſelf of the Contract.*

A Concord by Paroll is no good Plea in bar to an Action brought upon a ſingle Biil, though it be not penal. *Paſc. 23. Car. B. r. For bare words are not of ſo great force in Law as Agreements put in Writing, becauſe things put in Writing are ſuppoſed to be done upon mature advice and deliberation, but words are not preſumed to be always ſo ſpoken.*

Every Plea muſt be Pleaded either in bar to the Action brought, or in abatement of the Writ upon which the Action is framed, otherwiſe it is but a diſcourſe and not a Plea, becauſe the Plaintiff cannot take an Iſſue upon it, and therefore if the Plaintiff do demur upon it, and his demurrer be adjudged good, he ſhall have Judgment againſt the Defendant for want of a Plea. *Paſc. 23. Car. B. r.*

Anciently all Pleadings were in *French*, then by the Statute it was Enacted they ſhould be in Latin. *Paſc. 23. Car. B. r.*

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The Plaintiffs Attorney is not bound to receive a Plea for the Defendant from any perſon that is not an Attorney. *Paſc.* 23. *Car. B. r.* Q. *Whether he ought not to receive it from the Defendant himſelf, if he tender it to him, or from his Sollicitor if he know him to be ſo.*

If the Plaintiff do put in a Replication to the Defendants Plea, at any time before Iſſue joyned, the Defendant ought to Plead unto it, although it did not come in, in due time, according to the courſe of the Court, *Paſc.* 23. *Car. B. r. For the Plaintiff doth only delay himſelf by not putting in his Replication ſooner, and the Defendant is not prejudiced thereby.*

The Court will not direct any perſon how to Plead, although the matter be difficult, though they be moved to do it, but will bid them Plead at their own perils. *Paſc.* 23. *Car. B. r. For Councel are to adviſe how to Plead, and the Court is only to judge of the Pleadings, whether they be good in Law or not, and not to give Councel to the parties, but the uſage was otherwiſe formerly, but is now Antiquated.*

A thing ought not to be pleaded by implication, but in expreſs words. *Trin.* 23. *Car. B. r. For there can be no Iſſue taken upon it, becauſe it is not a direct affirmative, to which a negative may be Pleaded, and Pleadings ought to be plain and direct to the matter in queſtion, and that is the reaſon that all Argumentative Pleadings are void.*

If one Plead a Deed, he muſt produce it in Court, but one may give a Deed in evidence, although he cannot produce it, if he can make it out by proofs that there was ſuch a Deed, and ſo he may do of a Record. *Trin.* 23. *Car. B. r. For upon Pleading of a Deed, it is fit that the Defendant have a ſight of it,*

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that he may know what defence to make, which he cannot (it may be) do without a ſight of it, and every Plea ſhall be taken to be true, except it be denyed, but an evidence not preſumed to be ſo, but is believed or not believed, as the circumſtances of things do weigh with the Jury, who are Judges of it.

Where the Defendant is not conſtrained to Plead a ſpecial Plea, he may Plead the general Iſſue proper for the Action brought, and give the ſpecial matter in evidence. *Hill.* 23. *Car. B. r. For every Plea muſt be ſo framed that it may give a full anſwer to the matters ſet forth in the Declaration, to wit, all ſuch as are material to be anſwered unto; and if it do ſo, it is a good Plea, be it a general Plea or a ſpecial.*

It hath been adjudged a good Plea in a *Scire Facias* brought againſt an Executor upon a Judgment entred into by the Teſtator, to Plead fully Adminiſtred; for if he have fully Adminiſtred, he is not to be charged; but it is better for him to Plead that no goods of the Teſtators are come to his hands with which he could ſatisfie the Debt, *viz.* ſince the bringing of the Writ of *Scire facias* againſt him, for this ſeems to be a clearer Plea in bar. *Mich.* 22. *Car. B. r.*

One may plead a matter in Law, although it do amount to no more then a *non culp.* Mich. 23. Car. *B. r. For if the party be not guilty by Law, notwithſtanding that which is alledged againſt him be true, it is all one as if the matter alledged againſt him were not true; for no man is further guilty of a thing then the Law makes him guilty; but to Plead* non culp, *is the better and plainer Plea, as I ſuppoſe.*

A Plea may be amended upon leave of the Court, if it be but in paper and not entred, but the party that

that amends it, muſt pay coſts unto the other. *Hill. 23. Car. B. r. For it is not reaſonable that the Court ſhould grant him favour to the prejudice of the other party, who by this amendment is put to new trouble and charges; but if the Plea be entred in Parchment, and the Record made up, the Court will not give leave to amend it.*

A Clerk of the Court ought not to refuſe a Plea, although it be not put in in time, but the Plaintiff muſt move the Court, and abide by their rule therein. *Hill. 23. Car. B. r. For the Court and not the Attornies are to judge of the Legality of the proceedings in all Cauſes depending before them, as well as they are to determine the matters in Law in them.*

One that is Endicted of Felony or Treaſon, ought not by the Law to be admitted to Plead to the Endictment, until he hold up his hand at the Bar; yet as I remember, Sir *John Stowell* refuſed to hold up his hand, and yet was admitted to Plead; the holding up of the hand is in the nature of an appearance, which ought to be Recorded before Plea Pleaded. *Paſc. 24. Car. B. r.* Q. *Whether it is to be done to the end that the Court, Jury and People may take the better notice of the Priſoner, or for what other reaſon.*

One cannot Plead his pardon for Treaſon, until he is charged in Court with the Endictment of it. *Paſc. 24. Car. B. r. For it muſt appear to the Court what the crime is, before they can judge of the pardon of it.*

If one tender an Iſſue in abatement of a Writ, and there is a Demurrer to it, if the Demurrer be overruled, there muſt be a *reſpondes ouſter*, for the overruling of the demurrer is not peremptory to the party. *Trin. 24. Car. B. r. For the matter in queſtion*

is not determined by the demurrer, but only the goodneſs of the Writ brought; and if it be adjudged good, the party muſt anſwer to the matter contained in it, for this is all the Writ requires, and the Demurrer is not an abſolute refuſal to anſwer, but to that Writ, upon ſuppoſal it is inſufficient. But if Iſſue be taken upon a Plea in Abatement, as upon a miſnoſmer in the Plaintiff, or other ſuch like Pleading, & it be found againſt the Defendant, the Jury ought to Aſſeſs coſts and damages, and the Verdict in that caſe is final, and there ſhall be no reſpondes ouſter, *as upon a Demurrer; becauſe it is the folly of the Defendant to put himſelf upon a falſe Iſſue, to trouble himſelf and the Court, and no man ſhall take advantage of his own wrong, but in the other caſe of a* reſpondes ouſter, *he referred himſelf to the Judgment of the Court, and ſo there is an apparent diverſity in theſe two caſes,* Rittermaſter *againſt* Stanly. Mich. 21. Car. 2. R. in B. S. *And ſo was the opinion of the Court of Kings upon a Writ of Error, brought upon a Judgment given in the Common Pleas, between* Amcotts *and* Amcotts. *Paſc. 17. Car. 2. R.*

The Pleading of payment upon an Action brought upon a penal Bill, without ſhewing an acquittance, is but a Plea in abatement of the Writ, but with an acquittance, it is a Plea in diſcharge of the Action it ſelf. *Trin. 24. Car. B. r.* Q. *Whether pleading of payment be a good Plea to any intent.*

If one do demur upon ſuch a Plea as ought not to be pleaded, by his demurrer he doth admit the Plea to be a Plea, ſuch as it is. *Trin. 24. Car. B. r. For the demurrer is but to try the ſufficiency of the Plea.*

One may (ſometime) Plead a Plea which is properly a Plea in bar by way of abatement; and a Plea which is properly a Plea in abatement, by way of a Plea

Plea in bar. *Trin.* 24. *Car. B. r. But this holds not in all caſes, but only in ſome ſpecial caſes.*

A Plea in abatement of the Writ, ought not to be received after the Defendant hath Emparled, for by Emparley he admits the Writ to be good; yet if it be received, and the Plaintiff doth demur to it, the demurrer is good. *Trin.* 24. *Car. B.r. For the Plaintiffs accepting of the Plea after imparlance, is no prejudice to the Defendant, and therefore it is but reaſon that he ſhould take advantage of the inſufficiency of the Plea, by demurring to it, if he ſee cauſe; and it was the Defendants fault to Plead ſuch a Plea as might be demurred unto.*

It is intended in Law, that every Plea is entred when it is pleaded, for anciently the Serjeants at Law did uſe to plead all the Pleas in Court at the bar. *Trin.* 24. *Car. B. r. And before they were entred they could not Plead them, but now they are not entred uſually before they be Pleaded.*

If one be ſued upon an Obligation, he cannot be compelled to Plead before he have *Oyer* of the condition of the Obligation. *Trin.* 24. *Car. B. r. Becauſe he cannot tell what to Plead till he underſtand for what he is ſued.*

If there be a Verdict given in a cauſe wherein no iſſue was joined, this is a *Jeofail*, and it is not helped by the Statute; for the Statute is to help ill iſſues, and not to ſupply iſſues where none are joyned, and therefore there muſt be a Repleader. *Paſc.* 24. *Car. B.r. To bring the matter in diſpute in queſtion, for there is nothing tryed, and ſo there can be no Verdict.*

Upon over-ruling of a Plea, which is only in abatement of the Writ, there ſhall be a *reſpondet ouſter*, that is, the Defendant ſhall only be ruled to

put in a better Plea; but upon over-ruling of a Plea which is Pleaded in bar of the Action, Judgment ſhall be given againſt the Defendant, for ſuch a Plea is *peremptory. Trin. 24. Car. B. r. But a Plea in abatement is only dilatory, and is not to bring the matter in queſtion to an Iſſue, but to delay the Plaintiff. Q. Whether he ſhall not pay Coſts preſently, or that they ſhall be conſidered after the Verdict given in the caſe upon the new Plea.*

If a Plea be put into the Office in due time, it is well enough, although it be not delivered to the Attorney of the Plaintiff. *Trin. 24. Car. B. r. So that he may not enter Judgment for want of a Plea, but it is uſual for the Defendants Attorney to deliver a Copy of the Plea to the Plaintiffs Attorney.*

In an Action of Debt brought for Rent, upon an Indenture of Demiſe for years, the Defendant may Plead payment without ſhewing the Deed, for the Leaſe ſhall be intended to be in being at the time of the Action brought. *Trin. 24. Car. B. r. Except the contrary be ſhewn, and if the Leaſe be in being, he is not bound to ſhew any diſcharge for the Rent, for he cannot compel the Leſſor to make him any when he pays it.*

A colourable Plea ought to be entred, but that which is no Plea ought not to be entred. *Trin. 24. Car. B. r. For a colourable Plea is a Plea until it be overruled; for the Court will not ſpend time to diſpute things which are clear.*

Q. *Whether one may Plead a Leaſe for years by Indenture without ſhewing the Indenture.* Trin. 24. Car. B. r. *It ſeems the ſafer way to ſhew it.*

In an Action of Debt brought upon an Obligation, the Defendant is not bound to plead until he have

have *Oyer* of the Condition of the Obligation. *Trin. 24. Car. B. r. But he may Plead without* Oyer *of it if he please, and if he do Plead without* Oyer, *he cannot afterwards have* Oyer *of it, for he hath waved his advantage and may not resume it.*

If one Plead a Plea that is not good, and the Plaintiff doth demur upon it, the Defendant cannot afterwards amend his Plea, without the Plaintiffs consent. *Mich. 24. Car. B. r. For the Defendant shall not take advantage of his own ill Pleading to delay the Plaintiff, and to put him to more trouble and charge then by the Law he may do.*

If the Defendant will plead a Dilatory Plea, he must plead it upon the giving of the first Rule in the Office for the Defendant to plead, and he must plead a Plea in chief after the second Rule given in the Office for the Defendant to plead; and this is the reason that Judgment cannot be entred against the Defendant for want of a Plea, until the time given by the two Rules to Plead be past. *Mich. 24. Car. B. r. But if he then put in a Dilatory Plea, the Plaintiff may take his Judgment notwithstanding.*

If the Defendant hath pleaded an Outlawry in disability of the Plaintiff, and that be reversed, he shall not Plead another indisability. Per Magistrum Livesey, & al. &c. P. 21. Car. 2. Regis.

The ancient course of practice was for the Defendant to put in his Plea into the Office, before that the Defendants Attorney did deliver it to the Plaintiffs Attorney, because it is not such a Plea as the course of the Court allows of. *Mich. 1649. B. S. But now it is not so used to be done.*

The Maſter of the Office of the Kings Bench, ought not to ſuffer the Original Pleas brought into the Office, to be delivered out of the Office, but only Copies of them. *Mich.* 1649. *B. S. For by the Pleadings in the Office, are the Pleadings made up for the Iſſue to be tryed, and if any queſtion ariſe about altering of them, they are to be examined and rectified (if any alteration be) by the Pleas in the Office, and not by any Copy of the Plea.*

A Plea that is grounded upon a Statute, if it be not good, is not helped after a Verdict. *Mich.* 1649. *B. S. For the Statute being the foundation of the Plea, if it be not well laid, the Plea is naught in the very ſubſtance of it, and ſuch Pleas are not helped by the Statute of* Jeofails. *See the Statute.*

If an Action be brought in this Court to recover Lands, and the Defendant emparls; yet he may after imparlance (as it hath been held) plead that the Lands in queſtion are ancient Demeſne, and demand Judgment whether this Court may hold Plea of them, for it ſeems by the imparlance he doth not affirm the juriſdiction of the Court; but if he plead to the Defendant, and make a full defence, he cannot after that plead to the juriſdiction of this Court, for by pleading he hath in effect confeſſed the juriſdiction of the Court. *Mich.* 1649. *B. S.* 8. *Ap.* 1650. *B. S. Paſc.* Q. Tamer. *For it hath been doubted and held it could not be after imparlance.* Paſc. 1650. 4. Maii.

See Rep. 98 66: 67

If the Plaintiffs Attorney deliver an imperfect Declaration to the Defendants Attorney, and he accept of it; yet he is not bound to plead until the Plaintiff have perfected his Declaration. *Mich.* 1649. *B. S. For until it be perfected, it is no Declaration, but he may well demur, which is the uſual practice, it ſeems*

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he may, for it ſhall be intended a true Copy, yet it is not ſafe to do it without examining it by the Declaration put into the Office.

If it be doubtful between the parties, whether a Plea be good or not, it cannot be determined by the Court upon a motion made, that the Court would deliver their opinions whether it be good or not, but there ought to be a Demurrer upon the Plea; and upon hearing of arguments thereupon, the Court is to judge whether that Plea be good or bad. *Hill.* 1649. *B. S. Jan.* 26. *For the Court will not upon the ſudden, and without deliberation, deliver their opinions in things which are dubious in Law.*

If an Indenture be only pleaded by way of inducement, it is not neceſſary to ſay, *per Indenturam ſuam in curia hic prolat;* but if the party do derive any title unto himſelf by the Indenture pleaded, he muſt plead it ſo. *Hill.* 1649. *B. S. Jan.* 26. *That the Court may judge whether the title he makes by the Indenture, be warranted by it, and that the other party may conſider what anſwer to give unto it; for a bare inducement to a Plea requires no anſwer to it, becauſe it is not of the ſubſtance of it.*

If an Action be brought in the Sheriffs Court in *London*, and be afterwards removed by a *Habeas Corpus* into this Court, the Defendant ought to plead the ſame Term the cauſe is removed, and proceed to a tryal. *Hill.* 1649. *B. S.* 9. *Feb. For the Court will not grant the party to take any advantage by the removing of the cauſe hither to delay the other party in the courſe of his proceedings, which would be, if he ſhould not be compelled to plead the ſame Term the Cauſe was removed.*

If an immaterial Iſſue be joyned, it is not helped by the Statute of *Jeofailes*; but there ought to be a *Repleader*. *Paſc.* 1650. 5. *Mail. B. S. vid. Iſſue. For an immaterial Iſſue is (in Law) as no Iſſue.*

A Plea in the late Rebellion that the Plaintiff had not taken the Engagement according to the pretended Act, ought to be pleaded in this manner, *petit adviſamentum curiæ ſi volunt procedere, quia querens non ſubſcripſit engageamento.* And when the Plaintiff hath ſubſcribed the Engagement, and made it appear to the Court that he hath done it, it was to be entred upon the Roll, *quod querens ſubſcripſit engageamento*, and then the Plaintiff might proceed. It might alſo have been averred upon the Roll, that the Plaintiff had not taken the Engagement, although he had Judgment in the Cauſe, and thereby Execution ſhould have been ſtayed until he had ſubſcribed it. *Trin.* 1650. *B. S.* 3. *Julii. All this Pleading was long ſince out of doors.*

If the Defendants plea do not anſwer all the matter contained in the Plaintiffs Declaration, it is no good plea; but the Plaintiff ſhall have his Judgment intire againſt him for want of a plea. *Hill.* 1650. *B. S.* 31. *Jan.*

When a general plea is pleaded, the Attorney ought to ſet his hand to the plea, and then the Iſſue is joyned and if he will not ſet his hand to the plea, Judgment may be entred for want of a plea; for the Attornies hand warrants the plea, and before his hand ſet to it, it is no plea, if it be an ordinary plea. *Hill.* 1650. *B. S.* 5. *Feb. But if it be a ſpecial Plea, there muſt be a Counſellors hand ſet unto it, becauſe it is ſuppoſed to be adviſed by Councel and Counſellors, to maintain it to be good if it be diſputed.*

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If one be ſued by original Writ, he muſt plead the ſame Term, in which the original is returned; if the Defendant be Arreſted by a *capias* containing the cauſe of Action exactly as the original, and if ſuch *capias* be returnable the ſame Term with the original; but whenſoever the *capias* is returnable, the Defendant muſt plead preſently if required. *Hill.* 1650. *B. S.* 6. *Feb. But it is not ſo where one is ſued by a Latitat, or a Bill of* Middleſex. Q. *Differentiam & rationem inde.*

If one be compelled to alledge double matter in his plea, yet if he do inſiſt but upon one of them, the plea is not double. *Trin.* 1651. *B. S. For upon that matter only upon which it is inſiſted upon, ſhall Iſſue be joyned, and the other matter requires no anſwer.*

If the Plaintiffs Attorney will conſent unto it, the Defendant may wave his plea pleaded without moving the Court. By *Rolle* Chief Juſtice. *Trin.* 1651. *B. r. But if he will not conſent, it cannot be done without moving the Court; for the common courſe of proceeding is not to be altered but by leave of the Court, which upon cauſe ſhewn, the Court will ſometimes give way unto, if the doing of it be not very prejudicial to any party.*

A ſpecial plea is a plea, although it have not a Counſellors hand ſet to it; and therefore Judgment cannot be entred for want of a plea, although a Counſellors hand be not to it, without acquainting the Secondary of the Office and obtaining his leave to do it, for it may be it was not put in for a ſpecial plea, and the Plaintiff muſt not be his own Judge. *Mich.* 1651. *B. S. Per* Rolle *Chief Juſtice. Yet if the Secondary ſhall adjudge it to be a ſpecial Plea, I conceive the Defendant may afterwards have leave to get a*

Counſellors hand to it, and ſhall not be ſnap'd with a judgment for want of it.

The prayer of the priviledge of the Court is not properly a plea, for it was anciently demanded by Writ, although it be now uſually allowed by the Court upon the prayer of the party who claims it. By *Latch* Apprentice in the Law of the *Middle-Temple. And every Plea is either a Plea in abatement, a Plea in bar of a Plea to the juriſdiction of the Court; and the praying of the priviledge is none of theſe, but only a deſire of the party he may not be ſued elſewhere, then in the Court where he prays his priviledge.*

poſt 111

In the Caſe of *Cobb* and *Webb. Trin.* 1659. *By the Court. If a Declaration be delivered to a Caſual ejector before the Eſſoigne day, if the Tenant in poſſeſſion will defend the Title, he ought ſo to plead, that a Tryal may be had the next Term, and ought not to imparl.*

Plea.

Upon a motion betwixt *Briſkoe* and *Arnold.* By *Glyn* Chief Juſtice. *When pleadings are made up and paid for, they ſhall be accounted as if they were entred, for the entry belongs to Clerks in the Office, and not the Attornies.*

If a Declaration be delivered to the Defendants Attorney, or put into the Office after the Eſſoigne day of the Term, the Defendant cannot be compelled to plead that Term, but he may imparl till the next Term. 1652. *B. S. For the Term was begun when the Declaration was delivered, and ſo it cannot be accounted a Declaration of the preceding Term, for the Eſſoigne day is part of the Term.*

Pardon.

Pardon.

He that will take the benefit of a general Pardon, ought to plead the Statute by which the general Pardon was granted. 21. *Car. B. r.* 8. *Ed.* 4. 7. 4. *H.* 7. 8. *That the Court may judge whether his offence be Pardoned or not, which they cannot do, except the pardon be pleaded, and that the party shews he is comprised in the pardon, and not excepted out of it.*

One that is found guilty of man-slaughter, must sue out his Pardon, or else his burning in the hand cannot be dispensed withal, for man-slaughter is Felony. 23. *Car. B. r. For which he is by the Law to be burnt in the hand, except he be pardoned.*

Penalty.

If a man bring an Action of Debt upon a Bond for performance of Covenant, the Plaintiff shall recover the whole penalty of his Bond, because in Debt the Judgment must be according to the demand, and the demand must be for the whole penalty; for it is the Defendants folly, after he hath obliged himself, not to take care to perform the Condition; but perhaps if his Case will bear it, he may have relief in Equity. 21. *Car. B. Regis.* See y^e Statute of W. & M. which prescribes relief in this Case

Perjury.

Perjury.

A false Oath taken before a person that hath not authority by Law to give the party his Oath in that cause wherein he is deposed, is not Perjury. 21. *Car. B. r. For the Oath is* Coram non judice, *and it is as if no such Oath had been made.* Q. *Whether the party which Administreth such an Oath is not Indictable?*

An Endictment for Perjury may be preferred against one for taking a false Oath rashly, and for want of consideration, although the party that took the Oath did not do it maliciously, and he may be convicted thereupon; but the line ought to be more moderate where the perjury is committed out of rashness only, then where it is committed maliciously. *Trin.* 24. *Car. B. r. For though the Law doth not tollerate offences, though they be committed out of infirmity; yet they have regard to the weakness of man, and will not therefore punish them so severely as offences committed upon premeditated malice to the party against whom they are committed.* Q. *If this being not voluntary Perjury is within the Statute.*

Process and Proceedings in Law.

All legal proceedings ought to take commencement by original Writ or by Endictment, or by information. 21. *Car. B. r. Or by Bill of* Middlesex *or* Latitat, *which is the original Process of this Court, and is in the nature of an original to cause appearance.*

If a *Cepi Corpus* be returned in one Term, the Defendant ought to plead the next Term after the return, so that the Plaintiff may go to a tryal the same

ſame Term, and ſo it is if the Defendant be brought into Court by a *Habeas Corpus*, or an *alias*, or *pluries Habeas Corpus*. *Mich.* 22. *Car. B.* r. *Elſe there would be delay in the proceedings, which the Court will not permit.*

If one be ſued upon a Latitat in the Kings Bench, and Arreſted upon it, after he appears he is committed to the Mareſchal, and if he can find Bail, he is delivered out of Priſon into the cuſtody of his Bail, and in both caſes he is in the cuſtody of the Mareſchal; in the firſt he is in the cuſtody of the Mareſchal himſelf, and in the latter he is in cuſtody of the Bail, and they may take him and keep him in cuſtody if they will, and if they let him go, it is an eſcape in them, for which they ſhall anſwer; but it is other ways when one is let to Bail by Mainprize.

One may be impleaded in *Banco Regis* in *Cuſtodia Mareſchalli*, by Bill without original. *N. B.* 243.

After the Plaintiff is Non-ſuit, he muſt begin his Action again, and cannot proceed upon his old Declaration. *Mich.* 22. *Car. B.* r. *For by the Non-ſuit the cauſe as to that Action is determined, and the parties have no day in Court; but he may put in the ſame Declaration again if he pleaſe, and proceed thereupon as upon a new Declaration.*

After a Verdict, there ought not to be a repleader, but the Plea is diſcontinued. *Mich.* 22. *Car. B.* r. Q. *For the practice is otherwiſe.*

Where the Defendant brings a Writ of Error to reverſe a Judgment given againſt him, and hath a *Superſedeas* to ſtay Execution upon the Judgment directed to the Sheriff of that County where the Execution is to be done; and yet he is taken by the Sheriff by vertue of an Execution taken out upon this

Judg-

Judgment, upon moving of the Court they will grant him a Writ of *Superſedeas* to Superſede this Execution, *quia emanavit erronice. Mich.* 22. *Car. B. r. For ſuch Execution ought not by Law to have iſſued out, much leſs to have been executed, becauſe of the Writ of Error depending, which ſuppoſeth the judgment to be erroneous, and ſo no Execution could be upon it.*

Bills of *Middleſex* are directed to the Sheriffs of *Middleſex*, as Latitats are to other Sheriffs, ſo Latitats Iſſue out to Sheriffs of all other Counties in *England*, as well as to the Sheriffs of *Middleſex*.

Where the Defendant did tender unto the Plaintiff the monies for which the Action is afterwards brought againſt him, before the Action was brought, and the Plaintiff refuſeth them, and will (notwithſtanding, ſue the Defendant for them upon a motion, and making this appear to the Court, the Court will order the money to be brought into the Court, and will ſtay the Plaintiffs Proceedings. *Trin.* 23. *Car. B. r. For the Court will not countenance any one to ſue another, who may have right done to him without ſuit, for this were to encourage men to be vexatious.* But the more uſual way in Actions *ſur aſſumpſit*, is to plead it with an *Uncore priſt*.

Vint. [illegible] Pl. 492

Inferior Courts ought to ſet forth the manner of their continuances upon their Proceſſes, and not to expreſs them generally. *Trin.* 24. *Car. B. r.*

The Proceedings in inferiour Courts, are not ſo regular and formal as the Proceedings are in the Courts at *Weſtminſter*, but are entred only in ſhort notes. *Paſc.* 24. *Car. B. r. Paſc.* 1648. *B. S. According to their cuſtom of practice which is allowable, ſo it be orderly and not againſt Law.*

If one be Arreſted by Proceſs of this Court, and be

be thereupon in Cuſtody, and the Plaintiff do not declare againſt him in three Terms after, the Defendant is by the rules of the Court to go out upon common Bail. *Trin.* 24. *Car.* B. r. *For the Court will preſume the cauſe of Action is not very great, becauſe it is ſo long before he declares, and they will not compel him to put in ſpecial Bail, but where it appears the cauſe is weighty and requires it.*

The continuances in the Proceſs of this Court, are not entred until the Judgment given in the cauſe proceeded in be entred. *Mich.* 1649. B. r. *For not till then the Record is made perfect.*

An appearance will help a miſcontinuance of Proceſs. 9. *Nov.* 1650. B. S. *Yet after the miſcontinuance, but not after a diſcontinuance of the Proceſs; for by the diſcontinuance of the Proceſs it is out of the Court, and cannot be recontinued by the conſent of the parties; but by the miſcontinuance it is not ſo.*

The bringing of a Writ of Error is a continuance of the Action. 10. *Feb.* 1650. B. S. *Hill. For the Action is not determined by the Judgment, if a Writ of Error be brought, but is ſtill depending, for the Judgment (it may be) may be reverſed, and ſo the Action remains as if Judgment were not yet given, becauſe the party continues his ſute to overthrow the Judgment.*

If a cauſe to be ſpoken to in Court be entred into the paper of Cauſes for the day in the Office, although it be not put into the paper of the Cauſes of the day delivered to the Judges, yet the Court will proceed in them if they be informed of it. *Trin.* 1651. B. S. *For it was but a miſtake of the Clerk, and it may be Councel on both ſides are retained for that day to ſpeak in it, and if it ſhould be put off, the Cauſe would thereby be delayed, and the parties put to more charges.*

Upon

Upon a Verdict or a Demurrer (ſometimes) the continuances in the cauſe are not entred, until after a Writ of Error be brought. *Paſc. 1652. B. S. For it is time enough then to enter them.*

Miſcontinuance of Proceſs is where one Proceſs is uſed for another Proceſs, *viz.* a wrong Proceſs inſtead of a right. *Trin. 1652. B. S. But a diſcontinuance of Proceſs is, when there wants ſome Proceſs to continue the cauſe in Court from one day to another.*

Proviſo.

A Proviſo in a Deed which ſounds in Covenant, is Collateral. 21. *Car. B. r. That is a Proviſo which is ſo penned, that it implies a Covenant in it; for there is difference betwixt a Proviſo, and a Covenant of a Deed; for a Proviſo doth often go by way of deſtruction of the whole Deed, or ſome part of it, or of the eſtate created by it, but a Covenant always ſtands with the Deed, and only an Action lyes upon the breach of it.*

A tryal by Proviſo was ordained by the Statute, to the end that the Defendant might free himſelf of ſuits brought againſt him, by trying the iſſue depending betwixt him and the Plaintiff, in caſe the Plaintiff doth not try it as he ought, which he may do the next Term after the Plaintiff ſhould have tryed it, or at any time after that when he pleaſeth. *Hill. 22. Car. B. r. Vid. the Statutes 23. H. 8. Cap. 15. and 4. Jac. 3.*

In all Actions lying in London and Middleſex, the Defendant cannot give the Plaintiff notice of trying the Cauſe by Proviſo the ſame Term Iſſue is joyned, except the Plaintiff hath firſt given the Defen-

Defendant notice of Tryal that Term, and made default. Per Magistrum Livesey, & al. Clericos. P. 21. Car. 2. Regis.

If a Proviso in a Deed be insisted upon at a tryal to destroy the Deed in which it is, there must be punctual proof, that the thing provided to be done or not done, was done or was not done according as the Proviso directeth. *Mich.* 1650. *B. S. For the Law doth not favour the destruction of Deeds or Estates, but doth favour the supporting and maintenance thereof, as much as may stand with the rules of Justice, and therefore doth require so strict proof of things, the doing or not doing whereof goes to the destruction of estate.*

Pledge.

The Plaintiffs pledges that he shall prosecute his suit may be entred at any time pending the suit. *Trin.* 22. *Car. B. r. For the putting in of Pledges is now but a meer formal thing, but what was the ancient use of putting them in.* Q. *Yet if the Pledges be not entred at all, it is Error, because the Law directs the Plaintiff to find Pledges.* Pro Jam 414

Pardon.

A general pardon doth discharge not only the punishment which was to have been inflicted upon the person of him that did commit the offence pardoned, but also the guilt of the offence it self. *Mich.* 22. *Car. B. r. It pardons* { pœnam / reatum } { culpæ. *So clearly that in the eye of the Law the Offendor is as innocent*

as

as if he never had committed the offence; ſo far doth mercy extend therein.

A Pardon may diſpenſe with the burning in the hand of a perſon that is convicted for Felony, but without a Pardon it may not be diſpenſed withal. *Paſc.* 23. *Car. B. r. By the Court.*

A Pardon in general words is not ſufficient upon a conviction for Felony. *Mich.* 21. *Car. Regis. But the crime for which he is convicted ought to be particularly mentioned.*

The words *Pardonavit, remiſit & relaxavit*, in a Charter of Pardon granted to one for Felony, do not reſtore unto him the goods which he forfeited to the King by his Felony, but the word *reſtituit* in the Pardon, doth reſtore him to his goods. *Trin.* 23. *Car. B. r. For the former words go but only to the Pardoning of the offence, but the latter to reſtoring to the eſtate forfeited by the Felony, and ſo the words in themſelves do import in their proper ſignification.*

A Pardon for treaſon cannot be pleaded until the priſoner be charged with the Endictment for the offence committed. *Paſc.* 24. *Car. B. r. For before he is charged by the Endictment, it doth not appear to the Court that he is the perſon that is pardoned by the Pardon. Vid. Title Endictment.*

If one have a Charter of Pardon for Felony committed by him, the Court ought to allow it upon the prayer of the party that hath it; but he muſt produce it at the Bar, and pray upon his knees that it may be allowed. 13. *Nov.* 1650. *B. S. And ſo it was then ſaid and done in one* Goffs *Caſe. For if he produce it not, the Court cannot take notice of it; and if he pray not the allowance of it, the Court cannot tell whether the party do accept of the benefit of it; and he doth it on his*

his knees, to express his thankfulness for the mercy afforded him by the Pardon. Q. *Whether the Court can allow a Pardon without a Writ of allowance directed to them for that purpose?*

A general Pardon doth pardon publick offences done to the Common-wealth, but it doth not pardon private injuries done to particular persons. *Pasc.* 1652. *B. S. For this if it should, it would be to mix mercy and injustice together, to be pitiful to one, and cruel to another in one and the same act.*

Postea.

The *Postea* is the issue or record engrossed in parchment, upon which a tryal is had; and which is afterwards to be entred in the Roll of the Court, where the Action tryed was brought, when the party enters his Judgment upon the Verdict had at the tryal. *Mich.* 22. *Car. B. r. It is called the* Postea *from the word* Postea, *which begins that which is entred by the Clerk of Assize upon the record that was tryed after the tryal setting forth that* Postea *that is afterwards, after the issue joyned at such a day and place, and before such a Judge, the Plaintiff and Defendant came, &c. to hear Judgment, that is to try the cause and hear the Verdict, and so sets forth the tryal particularly and the Verdict.*

The Court may stay the *Postea*, not suffering the party to enter Judgment upon his Verdict, if they find cause to do it. *Mich.* 2[illegible] *Car. B. r.* viz. *For some undue practice in the proceedings to the tryal, although the Plaintiffs cause was good; for it is not enough to have a good cause, but it must be also legally prosecuted.*

The Defendant hath four days by the rules of the Court to ſpeak in Arreſt of Judgment after the *Poſtea* is brought into the Court, and if the party for whom the Verdict paſſed, will not bring it in upon notice given to him by the other party, that he intends to move in Arreſt of Judgment; the Court upon a motion ſetting forth this matter, will order Judgement to be ſtayed, until four days after it ſhall be brought in. *Vide Notice.* That the Defendant may have time to conſider upon the Record what to move out of it in Arreſt of Judgment.

There is no general Rule of Court for the Clerk of the Aſſize to bring in the *Poſteas* into this Court by a preciſe time; for ſometimes poſſibly he may be able to bring it in ſooner then at another time; but if he be negligent, and return them not in convenient time, the parties grieved may move the Court, and thereupon the Court will make a rule that he bring them in ſpeedily. *Mich. 22. Car. B. r. To avoid further delay to the party concerned.*

If the Clerk of the Aſſize have miſtaken himſelf in drawing up of the *Poſtea*, as ſometimes it falls out to be, he may amend it by his notes which he took, and drew it up by; although it be returned. *Trin. 24. Car. B. r. But it muſt be before it be filed, for then it is a record of this Court, and may not be altered.*

After the *Poſtea* is entred upon Record, and the Record hath been read in Court, in order to the ſpeaking to ſome matter in Law in it, the Attorney in the cauſe ought not to have the *Poſtea* any longer in his cuſtody, but it ought to remain in Court. *Trin. 24. Car. B. r. As a Record of the Court, and in the cuſtody thereof.*

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The Defendant may give rules in the Office for the Plaintiff to bring in the *Poſtea*, if he do it not in due times and if he will not do it, when the Rules are out he ſhall be Non-ſuit. Q. 18. *Nov.* 1650. *B. S. For though he have a Verdict, yet he hath no Judgment, and ſo his ſuit is not determined, and ſo ſhall be Non-ſuit for not proceeding on, and the Court will intend that he will proceed no further, and the Defendant is not to be tyed to attend upon his proceedings upon incertainties.*

Although the Verdict given be prejudicial to the Plaintiff, as he conceives, yet he ought to bring in the *Poſtea. Paſc.* 1651. *B. S.* 13. *Maii. For he muſt abide by the tryal, though it may prove prejudicial unto him, that if he will not enter the Verdict, the Defendant may.*

A *Poſtea* is a record of this Court truſted with the Attorney in the cauſe by the Clerk of the Aſſize, and the Attorney is bound, if he be ſo truſted, to deliver it into the Office, that the Judgment may be entred by it by the Officer of the Court. *Trin.* 1651. *B. S. And if he do it not, the Court will enforce him to do it.*

It is not neceſſary to annex the *Diſtringas* unto the *Poſtea*, although it is uſual ſo to do. *Trin.* 1651. *B. S. For they have no relation one to the other.*

Presumption.

Where the Plaintiff doth declare in an Action of Debt for Rent behind, due upon an Indenture of Demise for years, it shall not be presumed that there is any other Rent due, or Lease made then that upon and for which the Plaintiff doth declare. *Mich.* 22. *Car. B. r. For this would be a foreign construction, and for which there is no inducement to warrant it.*

Where divers houses are let to one by one Lease, the Court will presume that the Lessee is in possession of them all, if he be in possession of any of them, if the contrary doth not appear. *Pasc.* 24. *Car. B. r. For although the Lessee may possibly have passed away his interest in some of them to other persons, or the Lessee did not enter into them all by vertue of the Lease, yet this not appearing to the Court, they will not presume it to be so, but will judge that the Lease took effect as to all.*

One Court of Justice will not presume that another Court of Justice will do injustice, except it do plainly appear unto them that it is so. *Pasc.* 24. *Car. B. r. For each Court ought to have an honourable opinion of the proceedings of another Court.*

Ports.

The Cinque Ports are not absolutely exclusive of the Common Law, so that it may not intermeddle in some Cases, with the proceedings in their Courts. *Mich.* 22. *Car. B. r. For the Common Law is the universal and supream Law of the Nation, and no place*

ought

ought to be ſo priviledged, either by cuſtom or charter, as totally to be exempted from its juriſdiction; for this might cauſe a failer of Juſtice in ſome caſes, if it ſhould be ſo, which this Court will not ſuffer if there be complaint made thereof.

A Writ of Error to reverſe a Judgment given in the Cinque Ports, is to be brought before the Warden and Conſtable of *Dover. Mich.* 22. *Car. B. r. For theirs is the ſupream Court, when the other inferiour Courts are ſubordinate.*

Whether a *Certiorari* lies to any of the Cinque Ports hath been a queſtion. *Paſc.* 23. *Car. B. r. Yet a* Certiorari *was granted out of this Court, to remove a Judgment given at* Dymchurch *in* Kent, *being a limb of one of the Cinque Ports, in* Rook *and* Knights *caſe.* Mich. 22. Car. B. r. Rot. 381. *moved by* Launcelet Johnſon *of the Inner Temple; this was granted upon a ſuggeſtion of a failer of juſtice there.*

Property.

He that hath the Land that lies on both ſides of a High-way, hath the Property of the ſoil of the High-way in him, although the King hath the priviledge for his people to paſs through it at their pleaſures; for the Law preſumes that the way was at the firſt taken out of the Lands of the party that owes the Lands that lye upon both ſides of the way. *Mich.* 22. *Car. B. r. By* Rolle, Q. *So that it ſeems it is called the Kings High-way, becauſe of the priviledge that the King hath in it for his people to paſs and repaſs through it, and not in reſpect of any property he hath in the ſoil it ſelf; yet divers, as of Mannors, do claim the ſoil as part of their waſt.*

He that hath the goods of another perſon delivered unto him to keep, hath a ſpecial Property in them, by reaſon of the delivery of them, and may maintain an Action againſt a ſtranger that ſhall take them out of his poſſeſſion; although they be not his own proper goods. *Hill.* 22. *Car. B. S. Becauſe an Action doth lye againſt him to whom they were firſt delivered by him that did deliver them, if he ſhall not redeliver them when he is demanded to do it; and therefore it is reaſon that he ſhould have a property in them againſt all other perſons whatſoever.*

A Legatee of goods hath no Property in the goods bequeathed unto him before they be delivered unto him by the Executor or Adminiſtrator. *Mich.* 23. *Car. B. r. For the property of them is not altered by the Will, ſo long as they are in the poſſeſſion of the Executor or Adminiſtrator.*

The Rector of a Pariſh Church ſhall be intended to be the proprietor or owner of the Tithes of the Pariſh, if the contrary be not ſhewed. *Trin.* 24. *Car. B. r. Becauſe generally, and by the Law, Tithes do belong to the Rector, although in many places they do not, where there are impropriations.*

If the Sea or a River ſhall by violent incurſion and breaking forth, carry away the ſoil of one, in ſo great a quantity that he that had the property in the ſoil can know where his Land is, he ſhall have it; but if his ſoil or land be inſenſibly, or by little and little waſted by the Sea or the River, he muſt loſe his Land. *Paſc.* 1650. *B. S.* 11. *Mail. Becauſe he cannot prove which is his Land.*

If one to ſupport the credit of a Bankrupt, will ſuffer the Bankrupt to have his goods in his cuſtody, and to diſpoſe of the Property of them, the Property of

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the goods ſhall be accounted to be in the Bankrupt, and the other upon a tryal for the property of them, ſhall be judged to have loſt his Property in them. *Paſc.* 1651. *B. S.* 18. *Ap. Becauſe by ſo doing he was a cauſe in part that others were deceived by the Bankrupt, whoſe credit he ſupported, and therefore he is juſtly puniſhed for his fraudulent dealing to the prejudice of others.*

Partition.

A Partition of Lands ought to be made according to the quality, and the true value of the Lands, and not according to the quantity or equal number of Acres. *Hill.* 22. *Car. B. r. For the Partition ought to be equal in value, which is ſo in the former, but may not be ſo in the latter,* viz. *the Diviſion by equality of Acres, for ſome Land is of greater value then other.*

Payment.

Payment of money before the day of Payment appointed, is in Law a Payment at the day. *Mich.* 22. *Car. B. r. For it cannot be in Preſumption of Law, any prejudice to him to whom the payment is made, to have his money paid before the time; and if it be paid before the day, it is paid at the day, and it appears by the receipt of it, that it is for his own advantage to receive it then.*

In an Action of Debt brought for Rent due upon an Indenture of Demiſe of Lands, the Defendant may plead payment without a Deed, and it is a good Plea in Bar of the Action. *Trin.* 23. *Car. B. r. Be-*

cause the Lessee cannot compel the Lessor to make him any discharge by Deed or Writing upon payment of the Rent; and therefore it is not reason he should be compelled to plead payment by Deed.

If one buy any thing of another, he that buys it, must pay the money contracted for to be paid for it, before the seller is bound to deliver him the thing sold. *Pasc. 24. Car. For the contract doth imply such a condition in it, viz. That the buyer paying so much money to the Vendee, that the Vender shall thereupon deliver the thing sold to the Vendee.*

A Payment of money shall be interpreted to be made according to his intention that pays it, and not according to his intention that receives it. *Mich. 1650. B. S. 22. Nov. For every one ought to interpret the intention of his own act, and not another, for this is but reasonable.*

Cr. El: 68
2 Brook. 107
3 Juster. 124

Procedendo.

If this Court do proceed to try a Custom of *London*, there the Party may move for a Procedendo, that the cause may be removed into *London*, that the Custom may be tryed there, for it cannot be tryed here, and so if a Procedendo should not be granted, the cause would remain untryed, and the party that brought the Action, would be without remedy. *Hill. 22. Car. B. r. Which the Law leaves no man without, much less will hinder Justice to be done.*

After the Defendant hath filed Bail in this Court, a Procedendo ought not to be granted, much less after issue is joyned in the cause. *Pasc. 23. Car. B. r. For by accepting of the Bail, the Plaintiff hath admitted the jurisdiction of the Court, and it is then too late to*

move

move for a Procedendo, much less after Issue joyned when the Cause is ready for a Tryal.

It is not necessary that a Procedendo do agree in form with the *Habeas Corpus*, by which the cause was removed into this Court; but it is sufficient if it do agree in matter and substance with it. *Trin. 24. Car. B. r. That is may appear that it is to proceed in the same cause that was removed.*

If the Defendant hath put in Bail in this Court, upon the removal of the cause hither by *Certiorari*, or *Habeas Corpus cum causa*, if afterwards the Bail be disallowed by the Court, if the Defendant shall refuse to put in better Bail, such as the Court shall approve of, a *Procedendo* may be granted to the Plaintiff to remove the cause back again to try it where the Action was first laid. *Mich. 24. Car. B. r. For disallowing of the Bail, makes the Defendant to be in the same condition, as if he had put in no Bail; and until Bail be put in, this Court is not possessed of the Cause so as to proceed in it.*

If a *Certiorari* to remove a cause, be returned before a Judge and not in Court, and there follows no proceedings in the cause after the *Certiorari* returned, if the party who is concerned will move for a Procedendo, he must move for it before the Judge, before whom the *Certiorari* was returned, and not in the Court whither the cause is removed. *Mich. 1649. B. S. Because the Judge hath been formerly acquainted with the return of the* Certiorari, *and may have better knowledge, why it was granted, and therefore the Court will not intermeddle to undo what the Judge hath done.*

Practice.

If the Attorney for the Plaintiff do tell the Defendants Attorney, that he is content to ſtay for a Plea till ſuch a time, and yet doth in the mean time enter Judgment for want of a Plea, this is not fair practice; but if this be made to appear to the Court, the Court will vacate the Judgment, and force him to accept of a Plea. *Hill. 22. Car. B. r. For the Law will not countenance fraud and falſhood in the proceedings thereof, nor ſuffer advantages to be taken thereby, but loves plain and fair practice.*

It is not fair practice for the Defendants Attorney to Demur to the Plaintiffs Declaration without probable cauſe, but only to gain time to plead. *Trin. 23. Car. B. r. For this is apparent cauſe of delay, which they ought not to be inſtrumental in againſt the known Rules of Practice.*

Priviledge.

If one that is a Priviledged perſon in one Court, do ſue another that is a Priviledged perſon in another Court, he that is ſued ſhall not have his priviledge allowed.

No priviledge is to be allowed to one that hath an Indictment preferred againſt him, although he be a Peer of the Realm. *Mich. 22. Car. B. r. For an Endictment is at the ſute of the King, and againſt him no Priviledge is to be allowed, for all Courts of Juſtice are his, and he may ſue where he pleaſe, for he ſhall be tryed* per pares, *which is a great Priviledge.*

One that was coming unto this Court to attend upon

upon his cauſe, was arreſted as he was coming, and was forced to put in Bail; but upon a motion, and making it ſo to appear unto the Court, he and his Bail were both diſcharged. *Mich. 22. Car. B. r. And the party that Arreſted him had been alſo puniſhed, had he not pleaded that he knew not that the party came about his buſineſs depending in the Court; for the doing of this was an affront to the Court, as well as an injury to the party Arreſted.*

One may have a Priviledge in the Land of another by preſcription; although he hath no title to the Freehold or ſoil. *Paſc. 23. Car. B. r. For although he now have it by preſcription, it might ariſe originally by grant, and whatſoever lies in grant, may be claimed by preſcription, ſo that the preſcription in this caſe is not unreaſonable.*

One that is Priviledged in this Court, ought not thereby to claim his Priviledge to have a tryal at the Bar for to try the title of Lands which he claims in remainder. *Trin. 23. Car. B. r. For it is incertain whether the remainder may fall whilſt he continues a Priviledged Perſon, and for the preſent he claims no preſent intereſt in the Lands; nay though he had a preſent claim to them, yet he ought not to be ſo Priviledged, if the Lands in queſtion be not of a great value, or elſe the title very difficult to be tryed, and in ſuch caſes, any other perſon, though not Priviledged, may have a tryal at the Bar; and tryals for Land ought by the Law to be in the County where the Lands lye.*

A Priviledged perſon ſhall not be allowed his Priviledge upon a motion for it to the Court; but he muſt appear and plead his Priviledge, and upon his pleading it, he ſhall be allowed it. *Mich. 23. Car. B. r.* Q.

R Philisers Clerk did claim to be Priviledged in this Court, but was denyed it. *Mich.* 23. *Car. For though the master may be Priviledged, yet the Court takes no notice of the servant, for he hath no necessary dependance on the Court.*

The Lord Mayor of the City of *London* is Priviledged from all Actions during his Maioralty, in regard of his Office, except it be for Felony or Treason, or Actions which concern Free-hold; this is, that he may not be hindred in the Government of the City, which being the Metropolis of the Nation is of higher concernment, in respect of the publick, then any mans particular interest. *Pasc.* 24. *Car. B. r. For these are matters of a high nature, and it much concerns the Publick to have speedy Justice to be done in them.*

A Member of Parliament is Priviledged, as well in his Lands and goods as in his person. By *Rolle* Chief Justice. *Mich.* 24. *Car, B. r. In the Case of the Lord* Mohune. *For by being disturbed in any of them, he is hindred in serving of the Common-wealth, which is to be preferred before all private interests whatsoever.*

An Attorney of this Court that is sued as an Executor, is not to be Priviledged, for he is sued in the right of the Testator, and not in his own right. *Pasc.* 1650. *B. S.* 7. *Maii. And his personal Priviledge is not applicable to him in any other relation, then as he is an Attorney of the Court.*

The prayer of Priviledge is not properly a Plea, for a Priviledged person did anciently demand his Priviledge by Writ, but of latter times the party hath been admitted to his Priviledge upon his prayer to the Court. By *Latch* Apprentise. 1654. *B. S. Vide antea Title Plea and Pleading.* vide 424

A Clerk of this Court is not bound to lay any perſonal Action which he brings againſt another out of the County where this Court doth ſit. *Mich.* 29. *Car. B. r. But by his priviledge he may lay it here, notwithſtanding the Cauſe of his Action did ariſe in another County; and he is thus priviledged in regard of the conſtant attendance he is tied to give in this Court; yet in real Actions he is not thus priviledged; For ſuch Actions are local, and muſt be tryed in the County where the Cauſe of Action did ariſe, whereunto no Priviledge can be pleaded.*

In the Caſe betwixt *Oliver* Protector and *Syndercomb. Hill.* 1656. *The Priviledge of the Court was prayed, and granted to protect a Witneſs from being Arreſted in coming or going from the Court, who was to give evidence for the Protector upon an Endictment of High Treaſon preferred againſt* Syndercomb. Nota.

In the Caſe of *Robinſon* and *Wright*, it was ruled, that though *Robinſon* was an Alderman of *London*, yet he ought not to be priviledged to continue his Action in *London*, where the cauſe of Action aroſe in another County, and was a perſonal Action.

One that hath a ſute depending in this Court is priviledged by the Court from Arreſting, in coming hither from his houſe or lodging to follow his Cauſe, and alſo in departing from the Court back again, directly to his houſe or lodging; and if he be Arreſted in ſo doing, the Court upon a motion made to inform them of it, will ſet the party at liberty, and puniſh him that Arreſted him, if he did know he had a ſute depending here, and came hither to attend it. Were it otherwiſe, it might be very miſchievous to the party.

The

The wife of an Attorney of this Court, if ſhe be Arreſted, ought not to claim the priviledge of this Court, not to put in bail to the Action, as her huſband may, if he be Arreſted; but her husband muſt put in bail for her, and for want thereof ſhe is to be committed to Priſon. *Trin.* 1650. *Jun.* 25. *B. S. For her husband is priviledged only in regard of his perſonal attendance upon the Court, and of that tye which the Court hath upon him in regard of his relation to the Court, and ſo it is only a perſonal priviledge annexed to his perſon, and concerns not his wife.* Vid. Auxi. 262. plus de Priviledge.

In the Caſe between *Ridley* and *Carr. Paſc.* 1656. *B. S. It was ſaid by* Glyn *Chief Juſtice, and ſo ruled, that if an Attorney of this Court do abſent himſelf for a year from the Court, and gives no attendance, he doth by the new rules forfeit his priviledge.*

Prohibition.

In a Prohibition prayed to be directed to the Court of Admiralty to ſtay their proceedings, upon a ſuggeſtion that they did hold Plea there, upon a promiſe which was made *infra corpus comitatus*, and ſo not triable there, but at the Common Law; It was ſaid by the Court, that the ſurmiſe muſt be abſolute, that the promiſe was made *infra corpus comitatus*, and not, that if there was any promiſe made, it was made *infra corpus comitatus*, for this is incertain, for it appears not therby whether there were any ſuch promiſe made or no, and upon an uncertain ſurmiſe no prohibition can be granted; for no Iſſue

can

can be taken upon it, though it ſhould be falſe. *Hill.* 21. *Car B. r.*

This Court may by the Common Law grant a Prohibition to the Court of Admiralty to ſtay their proceedings, if they hold Plea of any matter, which the juriſdiction of their Court doth not extend unto. *Mich.* 22. *Car. B. r. For this Court is to regulate all other Courts in their juriſdictions, and not to ſuffer them to uſurp Authority where they have none.*

A Prohibition doth lie in all Cauſes, wherein a *Habeas Corpus* doth lie at the common Law. *Mich.* 22. *Car. B. r. For this Court hath power as well to ſee Juſtice done concerning a mans eſtate, as to his perſon.*

Although it be queſtionable, Whether a Prohibition do lie in the Caſe wherein it is moved for; Yet this Court will grant it, ſo that the parties concerned may appear here, and plead, or demur, as they ſhall be adviſed, to the intent the matter may come in queſtion here and be decided, whether a Prohibition do lie in the Caſe or not? but if it appear to the Court clearly that a Prohibition doth not lye, the Court will not grant it. *Mich.* 22. *Car. B. r. And if it ſhall appear to the Court that a Prohibition doth not lye, the Court will then grant a conſultation, whereby the party that was ſtopped in his proceedings by the Prohibition may now proceed in that Court to which the Prohibition was directed.* Mich. 22. Car. B. r.

A Prohibition may be granted to the Prerogative Court, to hinder them from granting Letters of Adminiſtration againſt the Law, or to hinder any other proceedings which are not conſonant to the common Law. *Hill.* 22. *Car. B. r.*

Where

Where there is a ſute depending in the Eccleſiaſtical Court for a perſonal Eſtate, and alſo for Lands, a Prohibition may be granted to ſtop their proceedings there, as to the Lands only, and they may (nevertheleſs) proceed there as to the perſonal Eſtate. *Paſc.* 23. *Car. B. r. For as to the one they have Juriſdiction, and as to the other they have none.*

If the Common Law and the Spiritual Law do differ in the way of their proceedings, in matter of ſubſtance, and the Eccleſiaſtical Court will proceed according to the courſe of their Law, this Court will grant a Prohibition to ſtop their proceedings. *Paſc.* 23. *Car. B. r. For in things doubtful, the Common Law is to be preferred before the Spiritual Law, as being the more general Law, and more tending to the general good of the people, and the publick peace of the Nation, and that which beſt ſuits with the conſtitution of the Nation.*

If the Court of the Lord Mayor of *London* ſhall hold Plea of a Cauſe after it is removed into this Court by a Writ of *Certiorari*; This Court may grant a Prohibition to that Court to ſtop their proceedings there. *Trin.* 25. *Car. B. r. For after it is removed they have no further Conuſance of the cauſe, and therefore if they ſhall proceed, this Court will hinder their proceedings.*

A Prohibition may be granted out of this Court to any other Court that doth proceed in any cauſe, which doth not lie within their Juriſdiction. *Trin.* 23. *Car. B. r. For ſuch proceeding is to exceed their Authority, which this Court will not ſuffer, but is to keep all other inferiour Courts within their own bounds.*

A Prohibition may not be granted to an inferiour Court to ſtop their proceedings in a Cauſe which doth

doth not lie within their jurisdiction to try, after that the Defendant hath allowed the jurisdiction of the Court by pleading to the Action. *Trin. 23. Car. B. r. For it is then too late to move for a Prohibition, for he ought before he had pleaded, to have demurred to the Jurisdiction of the Court, and then if they had proceeded, he might have had a Prohibition, or without a Demurrer, I conceive he might have moved for a Prohibition, and have had it granted.*

The Defendant in the Court of Admiralty may have a Prohibition to that Court after he hath pleaded there, although he cannot have it to an inferiour Court after he hath pleaded; for an inferiour Court doth not draw the matter in question *ad aliud examen*, but doth proceed therein according to the common Law; but the Court of Admiralty doth draw the matter *ad aliud examen*, that is, to try it by the Civil Law. *Trin. 23. Car. B. r. And therefore this Court will use their Authority at any time to stay their proceedings in the Admiralty, although the Defendant have by his incautelous pleading allowed their Jurisdiction, because not only the party that prays the Prohibition is injured by their proceedings, but the Common Law it self, which the Judges are bound to maintain.*

It is not necessary for him that Libels in the Court of Admiralty, to shew in his Libel, that the Common Law hath no Jurisdiction of the matter for which he Libels, for that is taken for granted upon his preferring his Libel; but he that prays a Prohibition to the Admiralty in this Court, must suggest something, wherein in respect of the Cause depending there, and for which he prays the Prohibition, that Court hath no Jurisdiction of the Cause. *Hill.*

23. Car. B. r. *For the Admiralty cannot determine, whether the Common Law have Juriſdiction or not, and therefore it would be a vain allegation; but this Court can judge of the Juriſdiction of the Courts of Common Law, and can determine whether other Courts do intrench upon their Juriſdictions, or not.*

If the Court of Admiralty do hold Plea of any matter, which is not maritime, although the thing were done upon the Sea, yet this Court will grant a Prohibition to ſtop their proceedings. *Hill.* 23. *Car. B. r. For the Court of Admiralty hath only Juriſdiction in maritime Cauſes,* viz. *ſuch as only concern Sea-affairs, and not of all matters done at Sea, as Contracts,* &c. *the Tryal whereof belongs to the Common Law only, and not to the Admiralty.*

This Court will grant a Prohibition to the Admiralty, if there be cauſe for it, although that a conſultation have been granted in the Court of common Pleas in the ſame cauſe. *Hill.* 23. *Car. B. r. For this Court is not bound by the rules of the common Pleas, if they differ from them in opinion.*

This Court ought not to deny the party a Prohibition that doth pray it, if there appear cauſe for a Prohibition, for it is not a thing arbitrary, or *ex gratia curiæ* to grant it, or not to grant it. *Hill.* 23. *Car. B. r. For to deny it were to deny Juſtice to the party, in denying him the benefit of the common Law, which is every free-born Engliſh-mans birth-right, which he may challenge as his right and inheritance.*

A Prohibition may be granted to the Spiritual Court after a ſentence given in the Cauſe in that Court, for which the Prohibition is prayed, if there be cauſe, but the Court will not do it, until they have

have heard Counsel speak on both parts to inform their consciences, although before a sentence they use to grant it upon a bare suggestion of the party. *Tuesday* 2. *July.* 1650. *B. S.* and *Pasc.* 1652. *B. S. For a sentence in an Ecclesiastical Court is in the nature of a Judgment given at the common Law, and presumed to be given upon mature deliberation, and therefore this Court will not, but by good advice, make a sentence there given void, or hinder the execution of it. So great respect doth this Court bear to the judicial proceedings of other Courts.*

A Prohibition doth not lie to the Court of Admiralty in cases of Felony which are to be tryed there; yet if there be cause, this Court will grant a *Certiorari* to remove the Cause hither. *By* Rolle *Chief Justice in* Dothicks *Case.* 29 *Oct.* 1650. *B. S.* Q. *Timen, quia curia advisare vult.*

Trin. 1659. *By the Court. If an Action be brought in an inferiour Court, and the Defendant tenders a Plea there, that the Cause of Action is not within the jurisdiction of the Court, if they refuse this Plea, this Court will grant the Defendant a Prohibition to stay their proceedings in the Cause.*

Party and Privy.

Where one desires to be made a party to defend the title of the Land in question, in an *ejectione firmæ*, the Court will grant it, so that he will confess Leale, Entry and Ouster. *Pasc.* 23. *Car. B. r. In* Prince *and* Warners *Case.* 2. Maii. 1648. *But now that rule is enlarged, for he must now confess Lease, Entry, and actual Ouster, and must not except against the Jury for want of Hundreders, but insist only upon the Tryal of*

the Title; and if at the Tryal he do not all this, then Judgment is to be entred against the Lessors own ejector; this is according to the new way of practice, but anciently the practice was otherwise.

Purchase.

An Alien cannot purchase Lands in *England*, because by this means the Realm would be impoverished by transporting the treasure out of the Realm into foreign Countries; and by putting thereby part of the Lands of this Realm, that is to say, the Lands Purchased by the Alien, under the power of a foreign Prince. *Pasc. 23. Car. B. r. For not only the subjects person but his estate also is in a sort under the power of his Prince.*

Prescriptions.

One cannot prescribe to have two several ways by one joynt Prescription, but he must make several Prescriptions for them. *Trin. 23. Car. B. r. Q. For they might both begin by grant at one and the same time.*

Two Tenants in Common cannot prescribe for one Warrein. *Trin. 23. Car. B. r. That is severally, for they cannot both have it severally, but in common.*

A Copy-holder for life cannot Prescribe against his Lord, by reason of his Copy-hold, but a Copy-holder in Fee may prescribe, for he holds his Copy-hold in the nature of an inheritance. *Mich. 6. Nov. B. S. 1650. But an estate for life may be so short, that a prescription cannot lye for him; but Copy-holders for life may alledge a custom against their Lord.*

Parish

Pariſh.

A Pariſh may compriſe many Vills within it. *Hill. 23. Car. B. r. 24. Car. Paſc. Yet generally a Pariſh ſhall not be accounted to have any more then one Vill in it, except the contrary be ſhewed.* Hill. 23. Car. B. r. *Becauſe moſt Pariſhes have but one Vill within them.*

It ſhall not be intended that there is more then one Pariſh in a City, except the contrary be made to appear. *Trin. 23. Car. B. r. For ſome Cities have but one Pariſh.* Q. Tamen, *For very few Cities in* England *have but one Pariſh, and me ſeems intentions ſhould follow the* major *part.*

If the father of poor children leave the Pariſh, and leave his children in the Pariſh, if the children have a Grandfather in the Pariſh that is able to keep them, the Pariſh is not bound to maintain them, but the Grandfather. *Mich. 24. Car. B. r. See the Statute.*

If a High-way lye within a Pariſh, the Pariſh within which it lyeth is bound to repair it of common right, if it do not appear that ſome other perſons are bound by Law to repair it. *Mich. 1650. B. S. 24. Oct. For it ſhall be intended that the Pariſhioners, where it lies, have the greateſt benefit of it, and do make the moſt uſe of it, and it is moſt convenient and equal for the Pariſhioners in every Pariſh to repair the ways within it, if they be able to do it.*

Preſentation.

If the King do preſent to a Church by Laps, where he ought to preſent *pleno jure*, and as Patron of the Church; ſuch a preſentation is not good. *Hill.* 23. *Car. B. r. For the King is deceived in his grant by miſtaking of his Title, which may be prejudicial to him.*

The King may preſent to a Church by his letter ſent to the Ordinary to inſtitute and induct ſuch an one his Clerk to the Living. *Mich.* 1649. *B. S. Q. Whether he may do it by Paroll; and it ſeems to me he may, for a Letter is but a ſignification of his pleaſure therein to the Ordinary, which he may as well ſignifie by word as by writing.*

Principal and Acceſſory.

One that is preſent and aiding to the ſtabbing of another, is not a Principal, but only an Acceſſory to the ſtabbing, within the Act of 1. *Jac.* that made ſtabbing to be murder. *Hill.* 23. *Car. B. r. For the Act ſhall not be largely interpreted, becauſe ſo penal. See the Statute.*

Proof.

Although a record of a thing be loſt, yet if the matter may be proved by circumſtances to a Jury, it is ſufficient proof. *Paſc.* 24. *Car. B. r. For the right doth not wholly depend upon the Record, but upon the agreement of the parties to the Record, but a Record is*

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to make the right more clearly appear, and to preſerve the memory of it to poſterity.

If a Deed which is to be given in evidence at a tryal, be enrolled, there needeth no other proof of the Deed, then to ſhew the endorſement of the Enrollment. *Mich.* 1649. *B. S. For before a Deed can be enrolled, the party to the Deed doth acknowledge it before a maſter of the Chancery, that the Deed to be enrolled is his Deed, if the Deed be to be enrolled there, or before a Judge of that Court where it is enrolled, which is a ſufficient authority to enroll it, and to give credit to the Deed, and the endorſement of the enrollment upon the Deed is to be credited, becauſe it is made by a known Officer intruſted for that purpoſe. But I conceive it the more unqueſtionable proof, is to prove upon Oath that it agrees with the enrollment it ſelf, but the moſt ſure proof is to prove the execution of the Deed by Witneſſes, if it may be.*

A proviſoe in a Deed, which proviſoe goes in deſtruction of the eſtate paſſed by the Deed, muſt be punctually proved. *Mich.* 1649. *B. S. For the Law doth not favour things which ſound in deſtruction of eſtates, but ſuch things as tend to the affirmance and preſervation of them.* Vid. antea.

If a place be named with an *alias*, it is not neceſſary upon a tryal to prove both the names. By *Rolle* Chief Juſtice. *Mich.* 1650. *B. S.* Q. *Tamen*, For Crawley *when he was Juſtice was of another opinion, for he held both but one name.*

A Deed which is enrolled, and is not acknowledged before a Maſter of the Chancery (as a Deed which is enrolled *ad perpetuam rei memoriam*, and not to paſs an eſtate) muſt be proved by Witneſſes, if it be given in evidence at a tryal. *Mich.* 1649. *B. S. For*

the acknowledging of it before the maſter, is that which gives the chief credit to the Deed, and not the Endorſement of the Enrollment, which it but the act of a Clerk in the Office, though accounted the act of the Maſter of the Office.

A thing which is Proved to have been and continued for ſo long time as any one living can remember, ſhall be preſumed to have been beyond the memory of man, and will be accounted a good preſcription. *Paſc.* 1650. *B. S.* 11 *Maii. Becauſe the contrary cannot be proved.*

Plaint.

A Plaint is the cauſe which the Plaintiff doth expreſs in the Writ, for which he complains to the King againſt the Defendant, and for which he doth obtain his Writ. 21. *Car. For as the King denys his Writ to none, if there be cauſe to grant it, ſo he grants not his Writ to any without there be cauſe alledged for it; for as the King is bound to help them to right that ſuffer wrong, ſo he is bound (as much as in him lies) to defend his people from cauſleſs vexation.*

A Plaint in an inferior Court, is in the nature of an original Writ. *Paſc.* 1652. *B. S. For therein is briefly ſet forth the Plaintiffs cauſe of Action.*

Poor.

If the Father of Children do leave the Pariſh where he dwelleth, and there is a Grandfather of the Children to be found, this Grandfather, if he be able, is chargeable with the keeping of the Children, and not the Pariſh. *Mich.* 24. *Car. B. r. For the tye*

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of Nature is a nearer then tye the Law can or doth enjoyn. Vid. the Statute, and Title Parish.

Presentment.

A Presentment taken before Commissioners of Sewers was quashed, because 1. it did not appear in the Presentment by what authority the Commissioners did sit that took the Presentment, and so it might be *coram non judice.* And 2. because it did not appear that any of the Commissioners before whom the Presentment was taken, were of the *Quorum. Hill.* 1649. *B. S. As is directed by the Statute that gives them their Authority.*

Parliament.

The Parliament is not accounted to begin until the first day of the sitting thereof, and thence it is called the first Session of Parliament, although Writs are returned, and many adjournments may be before. *Pasc.* 1650. *B. S.* 21 *Maii. The Writs mentioned are meant the Writs directed to the Sheriffs of the several Counties, and to the Cities and Burroughs, to Elect Members for them to serve in Parliament.*

Presidents.

If there be a special cause to alter the ancient President of a writ, by reason of any new Statute or change in Government, the Cursitors are not to keep the old form, but are bound to alter it as the case requires, and if they shall refuse to do it, this Court will compel

pel them to it. *Trin.* 1650. *B. S. Else it would be very mischievous to the people, who by that means may have their Writs abated, and be put to the trouble and charge of purchasing of new Writs, by reason of their wilfulness or ignorance.*

Prisoner and Prison.

A Prisoner for Debt may be removed from the Fleet to the Kings Bench, and from thence to the Marshalsea for the same Debt. *Dyer* 275.

One that is imprisoned upon a *Capias utlagatum*, ought to be imprisoned as strictly as he that is in prison upon an Execution. *Trin.* 1650. *B. S.* 3. *Julii. For he that refuseth to answer the Law, offends in as high (if not in a higher nature) then he that is condemned by the Law, and is to be punished as highly, because the publique is much concerned herein.*

It is the course of the Court, when a Prisoner is delivered over by this Court unto the Marshal of the Court, to endorse the day of this delivery upon the back of the Writ, that it may be known when he was first committed to the Marshals custody. *Mich.* 1650. *B. r.* 20. *Nov.*

This Court may send for a Prisoner out of the Prison of the Marshalsea by rule of Court, without a *Habeas Corpus*, because that Prison doth belong to this Court, and they have the command of the Prisoners there in order to the execution of Justice, and the proceedings in that Court; but they cannot send for a Prisoner out of any other Prison, but by a Writ of *Habeas Corpus*. By *Rolle* Chief Justice. *Mich.* 1650. *B. S. Because the ordi-*

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many power of this Court extends not unto other Prisons and Prisoners.

Possession.

If one do make an Entry into the Lands of another, and that other doth notwithstanding the Entry, keep the Possession of the Lands entred into with his servants and cattel, the entry is no entry in Law, because the party in possession was not outted by such an entry; but if the servants and cattel be put out to gain the possession, he that is put thus out of possession, if he will prove a possession in himself after this, he must prove an actual re-entry afterward. *Pasc.* 1650. *B. S.* 25. *Ap. To regain the Possession.*

The proving of ones cattel, to be upon the Land in question, is not a sufficient proof, that he whose cattel they were, was in possession of the Land at that time when the cattel were there, *Pasc.* 1650. *B. S. For the cattel might be upon the Land* Dammage feasant, *and the Land at the time be in the Possession of another.*

Peremptory.

By the rules of the Court a Peremptory day to shew cause why the judgment should not be affirmed, is not to be given to the Defendant upon a Writ of Error brought to reverse a Judgment given against him, upon a *non sum informatus*, at the first reading of the record; but the Court will appoint a day to hear Counsel, for such a judgment is not so much favoured as a judgment upon a Verdict. *Mich.* 22. *Car. B. R.*

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If the Defendant do tender an issue in abatement of the Writ, and the Plaintiff doth Demur upon the issue, and upon arguing of the Demurrer, the issue is over-ruled, that is, is adjudged by the Court to be no good issue; the Defendant is only to answer over, that is, to tender a better issue, for the over-ruling of the former was not Peremptory to him, to be concluded upon the merits of the cause; for that never came in dispute. *Trin. 24. Car. B. r. But otherwise it is where such an issue and demurrer, is in bar of the Action, for there the merits of the cause is put upon it, but in the former the validity of the Writ is only in question, and whether the Defendant is thereby compellable to plead to the Plaintiff or not.*

If a Peremptory be put off by the Court, the party that will take advantage by the putting of it off, ought to enter the rule of Court that was made for the putting of it off. *Trin. 1651. B. S. A Peremptory is when a business is by a rule of Court to be spoken unto at a precise day, and if it cannot be spoken unto then, by reason of other businesses of the Court; the Court in such cases doth use at the prayer of the party, who is concerned, to dispense with the not speaking to it at that time, and doth give the party further time to speak in it, without prejudice to him, and this is called the putting off of a Peremptory; and this is used to be moved by Counsel at the rising of the Court, and is granted of course.*

Proclamation.

At the latter end of the Assizes, there useth to be Proclamation made, that no more records of *nisi prius* be put in to be tryed at that Assizes after such Pro-

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clamation made, and that they ſhall not be received after, and all perſons that are to attend their tryals, if the Records of *niſi prius* to be tryed be not then put in, may depart, and are bound to give no longer attendance at that Aſſizes. *Paſc.* 1652. *B. S. This is done when the Court perceive there are as many Records put in as can conveniently be tryed at that Aſſizes, and that the people concerned might not attend upon their cauſes in vain.*

Protection.

The Protection of the Court of the Kings Bench was granted to Protect a Witneſs that was to give Evidence againſt a Priſoner for the late Protector, upon an Endictment of High Treaſon. *Note.*

In the Caſe of one *verſ. Bright. Trin.* 1658. *It was ſaid by* Glyn *Chief Juſtice. That if one be out-lawed, this Court will not Protect him from being taken upon the Out-lawry, in coming and going from the Court, if it be upon buſineſs which concerns not that Out-lawry; for it is no reaſon that he that ſtands out in contempt of the Law ſhould have any Protection by it.*

Quaſhing

Quashing of Endictments, Orders, &c.

THis Court hath authority to Quash Orders of Sessions, Presentments, Endictments, &c. made in inferior Courts, or before Justices of the Peace or other Commissioners, if there be cause, that is, if they be defective in matter or form. *Mich.* 22. *Car.* B. r. *To Quash comes of the* French *word* Quasser, *or rather* Casser, *which signifies to break in pieces, to cancel, destroy, make null or void. But this Quashing is but by favour of the Court: for the Court is not tyed* Ex Officio *to do it, but may leave the party to plead unto them, and to take advantage of the insufficiency of them by pleading to them, as in many cases they use to do, although they know the Endictments to be insufficient, viz. where the Endictment is for some offence much prejudicial to the Common-wealth.*

In the Case of *Wells* and *Wells. Hill.* 1658. *It was said by* Glyn *Chief Justice, That a Sheriff that makes an ill return cannot move to quash it, though it was made upon a mistake, but must make a better, or else he is to be amerced.*

An Endictment may be Quashed for false Latine, or for having in it insensible words, or *English* words, or for defect in the form of it. *Trin.* 23. *Car.* B. r.

The Court will not Quash an Endictment of forcible entry after a Verdict found upon the Endictment against the Defendant, before hearing of both the parties concerned in the Cause. *Mich.* 23. *Car.* B. r. *For the Court hath regard to Verdicts, and will not make them fruitless without very good cause shewn.*

The Court will not Quash an information for a fault

fault in the body of it, but will leave the Defendant to demur unto it, if he believe it to be insufficient; but it is otherwise of an Endictment. *Pasc.* 1650. *B. S.* 24 *Maii. Quære rationem. It seems it is because informations are usually preferred for greater offences then Endictments, and upon more solemn advice.*

Quo Warranto.

A *Quo Warranto* was brought for vexation, upon forty eight points, and the Court being moved in it, did order that the prosecutor should wave that *Quo Warranto*, and should bring a new one, and therein insist only upon three points, but that he might proceed to a tryal upon it, his new *Quo Warranto*, in such time as he might have done upon the old. *Hill.* 22. *Car. B. r. To the end he might not be delayed in his proceedings by bringing of the new* Quo Warranto.

Quære.

Whether one that is under an Arrest may make an Obligation to the Plaintiff at whose suite he was Arrested, for his appearance to his Action. *Pasc.* 24. *Car. B. r. Pasc.* 1648. *B. S. In* Leach *and* Davies *Case. It seems because if the Bond should be sued, he may plead it was made by address, because he was under restraint when it was made.*

If a Lessee for years cut down Timber upon the Land lett unto him, and carry it away from off the ground, the Lessor may well bring an Action of Trover and Conversion, for the Timber. *Mich.* 24. *Car. B. r. Because immediately upon the severance from the Free-hold, the Law casts the property in the Lessor, which*

is called a general property; but whilſt it ſtood the Leſſee had a ſpecial property for ſhadow and maſts, &c. for his cattel; which being cut down, his ſpecial property is gone, and only the general property left.

Whether a fine levyed of Land ſhall extend to a contingent uſe of that Land. *Mich.* 24. *Car. B. r. In* Thomas *and* Kemiſhes *Caſe. It ſeems not, for the incertainty of the happing of it.*

If there be two Tenants in common of Land, and one of them dye. Quære. *How his wife ſhall be endowed of the Land which her husband held in common, whether by metes and bounds or not.* 16 *Nov.* 1650. *B. S.*

Return of Writs, &c.

THe Court was moved, that a return made upon a *Habeas Corpus* might be amended before it was filed, and it was granted. *Hill.* 21. *Car. B. r. But after it is filed it cannot be amended, for then it is a Record of the Court.*

If a ſpecial *Scire Facias* do iſſue forth, a *nihil* cannot be returned upon this *Scire Facias.* Hill. 21. Car. B. r. *For a* nihil *is a general return, which ought not to be in this caſe; becauſe the Writ is a ſpecial Writ, for the return muſt anſwer the Writ.*

If an inferior Court do make an ill return of a *Habeas corpus*, the Court will grant an *alias Habeas corpus*, and alſo ſet an amercement upon them for making an ill return of the former *Habeas corpus.* Hill. 21. Car. B. r. *Becauſe thereby,* viz. *by the ill return, Juſtice is delayed, and the party grieved is alſo put to more trouble and charge to obtain the* alias Habeas Corpus.

If

If a Writ out of this Court be directed to an inferior Court, which the inferior Court is not bound to allow, but may proceed notwithſtanding the Writ ſent unto them, yet they ought to make a Return upon the Writ, and in the Return to ſhew the cauſe, why they do not allow the Writ, but do proceed in the Cauſe, notwithſtanding the Writ. *Hill.* 22. *Car. B. r. For the Writs of this Court are to be obeyed, if there be not very good reaſon ſhewed to the contrary why they ought not to be obeyed, and therefore there muſt be a Return made, elſe the Court will ſuppoſe their authority is ſlighted.*

A Priſoner brought to the Bar, upon the Return of his *Habeas Corpus* may have a Copy of the Return, if he pray it, that he may take his exceptions to the Return. *Mich.* 22. *Car. B. r. But the Return muſt be firſt filed, for before it be filed it is not a Record of the Court, and it may be amended.*

If the Under-Sheriff of a County may be juſtly challenged, as partial to the Plaintiff, or the Defendant in reſpect of kindred or alliance, or ſome other cauſe that may render him not to be indifferent between the parties; and he be to execute a *Venire Facias*, to ſummon a Jury to try an iſſue joyned betwixt the Plaintiff and Defendant, in ſuch caſes the Court will upon motion of the party that is likely to be prejudiced if a Jury ſhould be returned by him, order that the High Sheriff of the County ſhall himſelf Return the Jury. *Mich.* 22. *Car. B. r. But* via verſâ, *they will not do it, but direct the* Coroner *to do it.*

If one be Arreſted by the Sheriffs Bailiff, and a Bond be given unto the Sheriff, that the party Arreſted ſhall appear at the Return of the Writ; the Sheriff ought not to Return a *Non eſt inventus*, but a *Cepi*

Corpus, and if he do Return a *Non est inventus*, the Plaintiff may bring an Action upon the Case against the Sheriff for making a false Return, or else the Court may amerce him for it; and if the Sheriff do Return a *Cepi corpus*, and yet the party Arrested doth not appear at the day, the Court will encrease amercements upon the Sheriff, until he make the party to appear. *Hill. 22. Car. B. r. For when the party is Arrested, he is in custody of the Sheriff, and he ought to keep him at his peril, and bring him in at the day, and it is of favour to the party that he takes Bond of him for his appearance, for he is not bound to do it; and if he suffer by it, he may take his remedy against the party upon the Bond.*

It is not requisite that the Sheriff in making a Return should insert his title or name of dignity, or Christian, or surname, but only by his name of office, for of that the Law takes notice. *Hill. 22. Car. B. r. Yet if he do insert those names, which is usually done, the Return is not thereby hurt or made defective, for it shall be accounted a Surplusage only.*

If the Sheriff Return a *Cepi corpus*, and the party Arrested is sick and doth not appear, there may in some cases a *Habeas Corpus licet languidus*, issue out of this Court to bring the party in, notwithstanding his sickness. *Hill. 22. Car. B. r. So that in some cases the party is not excused from obeying the Law, though the hand of God be upon him; for the Law regards publick Justice more then the private good and welfare of any particular person, yea of many particular persons, although it be also tender of the persons of all.*

If a *Capias ad satisfaciendum*, be awarded, and the party dye before the Return of it, it may be avoided by pleading, and his Bail shall be discharged. *Hill. 22. Car. B. r.*

If a Writ be returned by a person to whom it was not directed, the Return is not good. *Hill. 22. Car. B. r. For Processes of Law are to be executed by such persons only, as the Law directs them to, and takes notice of, as publick Ministers who are accountable for their actions, and not by private persons.*

A Return of the Sheriff ought not to mention the year of the Age of the King, but the year of the reign of the King. *Pasc. 24. Car. B. r. For the Sheriffs and all Ministers of Justice are Officers to the King as head of the Common-wealth in his politick capacity, and not in his natural capacity as a Man, but as he is a King, which relates to the time he began to reign, and not to the time of his birth.*

Where a matter to be tryed by a Jury doth concern the title or interest of the Under-Sheriff, there the Jury that is to try this matter, is to be returned by the High-Sheriff, and not the Under-Sheriff. *Trin. 24. Car. B. r. For it is to be presumed that the Under-Sheriff will not Return an indifferent Jury, where himself is concerned, for every one is apt to be partial for his own benefit.* Vid. 275.

It is not necessary for the Sheriff to Return the panel of the Juries names, but to say generally that they are *de vicineto* of such a place, for so it shall be intended, and the form of all Returns of Juries are so. *Trin. 24. Car. B. r. And old forms are to be observed and not varied from, but upon special reasons.* Q.

It is not necessary that the Return of a *Habeas Corpus*, or a Return made by Commissioners of Sewers, should be so formal and punctual, as a Plea ought to be. *Mich. 24. Car. B. r. Mich. 1649. For there is not so much prejudice to any one by their informality*

as may be by informal and ill pleading, neither are such Returns made by so learned men as pleadings are, and therefore the Court expects not, they should be so curious in framing of them, but will accept of them for good, if they be good in the substance of them, and to a common intent.

A Return of a *Habeas corpus* ought to be written in Parchment and not in Paper; and if it be made in Paper it is not good, nor will the Court accept of it. *Mich.* 24. *Car.* B. r. *Pasc.* 1650. *For the Return is to be filed, and made a Record of the Court, and all Records are to be in Parchment, that they may continue to posterity, which they will not so well do, if they were written in Paper.*

If a *Habeas corpus cum causa*, that is, a *Habeas corpus* to remove the body of the party, and of his cause depending, be directed to an inferior Court, they ought to Return the body and all the causes that are there depending against him at that time, and it is not sufficient to return one or some of the causes only. *Mich.* 2[illegible] *Car.* B. r. *For the word* causa *is there taken for* nomen collectivum, *comprehending more then one; for all the causes make but one as to detaining the party in Prison.*

In criminal matters, proceedings which are erroneous, are not helped after a Verdict, by the Statute of Jeofails. *Pasc.* 1651. B. S. 11 *Mxii. This is in favour of the life and liberty of the people which are most concerned in such proceedings, and are much favoured in Law, and the Statute extends not to them.* See the Statutes.

Record.

Record.

In the Case of *Dallington, verſ. Shepheard.* Trin. 1657. *In a Writ of Error.* By Glyn *Chief Juſtice. If after a* reverſetur niſi *be pronounced by the Court, the Record be amended, the Record ought to be read again and opened before it can be a* Concilium; *and this was ſo done in this Caſe, by* Twiſden *of Councel for the Writ of Error.*

If a Record come once into the Kings Bench, it never goes out again. 18 *Ed.* 4. 6. 29. *Aſſ.* 52.

A *Habeas corpus* is not a Record, until it is returned and filed, and then it cannot be amended, but before it be filed, it may. *Hill.* 21. *Car. B. r.* Vide antea.

If the writing or form of a Letter in a Record be doubtful, ſo that it may be taken either for one Letter or another Letter, the Court will conſtrue it to ſtand for that Letter, that is, for the maintaining and upholding of the Record, and not for that Letter which will go to the making of the Record erroneous and naught, *ut res magis valeat quàm pereat.* Hill. 21, Car. B. r. *For the Law doth delight to maintain the reality and being of things, and favours not the deſtruction and nullifying of them, and therefore if a Record be ſo penned, that the words may receive a double conſtruction, one to make the Record good, and another to make it erroneous, the Court will interpret the words that way, that will make the Record good, and not that way which will make it erroneous, for ſuch interpretation is more for the advancement of juſtice.*

A matter of Record muſt be proved by the Record it ſelf, and not by evidence; for no iſſue can be

joyned upon it to be tryed by a Jury, as it is of matters of fact. 21. *Car. B. r. For the credit of a Record is greater then any teſtimony of Witneſſes; but if the Jury do know there was ſuch a Record, they may find it though it be not produced.*

A Record certified out of an inferior Court, upon a Writ of Error brought, is not ſaid to be in this Court to be proceeded upon before it be entred here, or be in the Office, although it be ſhewed there. 21 *Car. B. r. For before that the Court is not poſſeſſed of the Cauſe.*

A Record ought to be pleaded intire, that is, the whole Record, and not part of it, with an *inter alia*, in reference to the Record, and ſo ought a ſpecial Verdict to find a Record. *Mich. 22. Car. B. r. For part of a Record taken by it ſelf, is not the Record, for a Record cannot be taken by parcels, becauſe it is an entire thing.*

This Court will not amend a Record which is moved out of an inferior Court; but they will amend a Record which is removed hither out of the Common Pleas, if they ſee cauſe, and ſo they will do Records removed out of the County Palatine of *Cheſter*, and ſome other Courts ſometimes. *Mich. 22. Car. B. r. Becauſe they take leſs notice of the proceedings in inferior Courts, then of the proceedings of the Common Pleas, and of the County Palatine and ſome other Courts of a higher nature then ordinary inferior Courts.*

Paſc. 1659. *The Court ordered a Record to be amended, after a Demurrer to the Record was diſcontinued, for then it was as if no Demurrer had been.*

The Court will not ſupply a blank left in a Record to make it perfect, whereas before it was defective,

fective. *Mich.* 22. *Car. B. r. For this were for the Court to make a Record, which is not their Office to do, but to Judge of them, and by ſo doing the party that might take advantage of the defect of the Record, would thereby be deprived of it, which the Court will be no cauſe of.*

If the Record of the iſſue made up ready for the tryal of the Cauſe be defective in ſome ſmall thing which may be well amended without defacing of the Record; the Court upon a motion will give the party leave to amend the Record, if he will pay coſts to the Defendant; although it be entred for tryal: but the Court will not give leave to amend it if it cannot be done without defacing and much altering of the Record. *Mich.* 22. *Car. B. r. For the Records ought to be plain and fairly written, that there may no queſtion ariſe how they are to be read.*

The Court will not make application of a Record produced to the matter for which it was produced for the benefit of the party that doth produce it, but the party himſelf and his Councel muſt do it. *Paſc.* 23. *Car. B. r. For if the Court ſhould do it, it would be for them to act the part of Counſellors and not of Judges, which they ought not to do.*

A tranſcript of a Record, which Record was amended in the Common Pleas, may by leave of this Court be amended here by a Clerk of this Court, but without leave of the Court, nor out of the Court it may not be done. *Paſc.* 23. *Car. B. r. For a Record cannot be amended without a rule of the Court grounded upon motion, for that is called the leave of the Court, for the Court ſpeaks by their rules.*

The Judges cannot judge of a Record given in evidence, if the Record be not *ſub pede ſigilli*, that is,

exemplified under ſeal, but a Jury may find a Record, although it be not ſo, if they have other matter given them in evidence ſufficient to induce them to believe that there was ſuch a Record. *Paſc. 23. Car. B. r. For the Judges are to judge only* de exiſtentibus & apparentibus, *but the Jury are induced in their Conſciences by things given in Evidence, which are but probable, for the moſt part, and accordingly they give their Verdict.*

If a Record be removed into this Court by a Writ of Error, and the Defendants Councel in the Writ of Error, do not open the Record right as it is, unto the Court, this falſe opening of it ſhall not be prejudicial to the Plaintiff in the Writ of Error, but he may examine the Record afterwards, and rectifie the miſrecitals. *Trin. 23. Car. B. r. And in ſuch caſes the Court will have the Record openly read, that they may judge of it.*

A Record may be contradictory in appearance and yet may in ſome caſe be nevertheleſs a good Record. *Trin. 23. Car. B. r. For the Law more reſpects the reality of things then outward appearances.*

A Record that is razed, remains a good Record notwithſtanding the razure in it, yet he that razed it, is not to go unpuniſhed for his offence. *Mich. 1649. Q. What razure is meant?*

Apparent faults and miſpriſions of the Clerk only, in Records removed out of inferior Courts into this Court, are amendable here by the Statute of 8. *H. 6. Trin. 23. Car. B. r. But not other faults or errors in them.* Vid. Stat.

Neither a Deed enrolled, or a Decree in *Chancery* enrolled, are Records, but it is a Deed and a Decree Recorded. *Mich. 23. Car. B. r. For a Record of a*

Court

Court is made up of the proceeding in ſome cauſe proceeded in in that Court; and there is difference in, betwixt a Record and a thing Recorded, for though every Record be a thing Recorded, yet every thing Recorded is not a Record.

When a Record is to be ſpoken unto in Court, the Councel at the Bar ought to open the effect of the Record before it is to be read by the Clerk in Court, by the cuſtom of practice; yet the Court may ſuffer it to be firſt read if they pleaſe. *Hill.* 23. *Car. B.r.*

There was a rule of Court made, that every Attorney of the Court ſhall enter the whole Record upon the Roll, after a Tryal had in the cauſe, before the next Term after the Tryal ſo had, upon the pain of twenty ſhillings to be paid by every ſuch Attorney that ſhall not do it, towards the relief of the poor. *Hill.* 1649. *B. S. That the Record may be ſpoken to the next Term after the Tryal, if there be cauſe, which cannot be done until the Record be perfected, and ſo by this the not perfecting it, the Clyent is delayed. Q. Whether it was taken notice of and entred.*

A Record cannot be removed by a Writ of Error, until the Judgment in that Record be entred. *Paſc.* 1650. *B. S.* 12. *Maii. For till then the Record is not perfected.*

By *Rolle* Chief Juſtice, it was the ancient cuſtom to enter the Record of the Cauſe before the Cauſe was carried down to the Aſſizes to be tryed; but this courſe was found to be inconvenient, becauſe it could not be amended after the entry of it, and therefore now they uſe not to enter the cauſe before the tryal be paſt, and therefore he ordered a rule to be ſet up in the Office, that if the tryal do not proceed at the Aſſizes, at which the Record was carried down

down to be tryed, and the Plaintiff will carry it down again, that he give the Defendant new notice of the tryal, and so likewise is the Defendant to do where he intends to try the cause by Proviso, that the adverse party may not attend with his Councel and Witnesses to no purpose. *Trin.* 1651. *B. S.* Q. *Whether this was done accordingly.*

Relief.

A Relief is the fruit of a Rent-service. *Hill.* 21. *Car. B. r. And it is two-fold; that is to say,* 1. *A Relief at the common Law; And* 2. *a Relief grounded upon a custom.*

Rescous.

An Endictment for a Rescous returned against one into this Court, ought not to be quashed, although it be erroneous, except the party that is endicted for it do appear personally in Court. 21 *Car. B. r. For he cannot in such a case appear by Attorney, because the offence was criminal and personal, for which he must answer in person.*

An Endictment of Rescous ought to express the place where, and the time when the Rescous was made, or else it is not good for the incertainty of it. *Trin.* 23. *Car. B. r. So that the Defendant cannot tell what answer to make for himself, in respect of the incertainty of the time and place, when and where the offence was committed.*

An Endictment of one that was Endicted for a Rescous, supposed to be made in the fifteenth year of King *Charls*, was quashed for its insufficiency, and yet

yet the Reſcouſer did not appear perſonally in Court (contrary to the common rule obſerved in ſuch caſes) the cauſe thereof ſeems to be, becauſe it was an old Endictment, and no proceedings had been made upon it againſt the party. *Paſc.* 24. *Car. B. r.*

Requeſt.

Where one is to do a Collateral thing, he ought to be requeſted to do it, but where the thing to be done, is a part of the contract, there needs no Requeſt to be made to the party to do it. 21 *Car. B. r. For by the contract he hath taken notice at his peril to do it; but it is not ſo of a Collateral thing agreed to be done upon making of the contract.*

Where one brings an Action of Covenant for not paying of moneys according to a Covenant, he needs not alledge, that he Requeſted the Defendant to pay them; but where he brings an Action of Debt for money due by Covenant, he ought to alledge a Requeſt. *Trin.* 23. *Car. B. r.* Q. Differentiam, *Whether it be, that in the former caſe the Plaintiff is but to recover what he is damnifyed by not performing the Covenant, and in the latter he is to recover the whole money Covenanted to be paid.*

Where one is bound to make a ſpecial Requeſt for the doing of a thing, a general *licet ſæpius requiſitus* in the Declaration is not ſufficient. *Trin.* 24. *Car. B. r. For thoſe words are too general, and meer matter of form, and in a ſpecial requeſt ought to ſet forth the time and place, and manner of the Requeſt made.*

In

In an Action of Debt brought for monies due upon an Obligation, it is not necessary to alledge a Requeſt. *Trin.* 24. *Car. B. r. For the very bringing of the Action is a demand of the money in Judgment of the Law; and the party was bound by his own Deed, to pay the money at his peril, without being demanded it.*

One may make a Requeſt by Attorney for the payment of monies due upon an Obligation. *Mich.* 24. *Car. B. r. Though he need make no requeſt at all, for the requeſt is not prejudicial to any body.*

Upon a Contract in the nature of a Debt, Requeſt or no Requeſt is not material, but it is otherwiſe if the Contract be a ſpecial Contract for a Collateral thing. *Mich.* 1650. *B. S.*

Repeal.

The Defendant cannot Repeal his Warrant of Attorney given to an Attorney to appear for him; but he is compellable to appear by his Attorney according to his Warrant by the rules of the Court, that he may not delay his appearance by that means to the prejudice of the Plaintiff. *Trin.* 22. *Car. B. r. Q. Whether he may not repeal his Warrant, ſo that he will appear by another Attorney.*

Reverſal

The Chief Juſtice or the ancienteſt Judge in the Court in his abſence, doth always pronounce the reverſal of an erroneous judgment to be Reverſed by

by a Writ of Error openly in Court, upon the prayer of the party, and he pronounceth it in *French*, to this effect, *Pur les errors avandit, & autres errors manifest in les record, soyt les judgement reverse, & le Defendant restore, a tout ceo que il ad per ceo perd.* In English thus. For the aforesaid errors, and other manifest errors in the Record, let the Judgment be Reversed, and the Defendant restored to all that which he hath lost by it. *Trin. 22. Car. B. r.*

The Reversal of a Judgment may be pronounced conditionally, that is, that the Judgment is Reversed, if the defendant in the Writ of Error do not shew cause to the contrary at an appointed time. *Trin. 22. Car. B. r. This is called a* reversetur nisi.

Where divers persons stand Out-lawed for a forcible entry, if the Out-lawry be erroneous, it may be Reversed as to one of the persons Out-lawed, and yet stand good as to the others, for the Out-lawries are several, but the possession of the Land cannot be restored until the Out-lawry be Reversed in the whole. *Hill. 22. Car. B. r. Because the force is not wholly purged.*

The Judge will not pronounce the Reversal of an erroneous Judgment, though it be adjudged to be erroneous, except the Councel for the Plaintiff in th Writ of Error do pray it may be pronounced. *Hil. 1649. B. S. 30 Jan. For the Judges are only to do justice to those that desire it, for their Office is to judge between party and party.*

Restitution

Reſtitution and Rereſtitution.

No Reſtitution is to be granted by the Court, upon a ſuggeſtion of the inſufficiency of an Endictment of forcible entry or other matter, until the *Certiorari* granted to remove the Endictment into this Court be returned and filed. *Mich. 22. Car. B. r. For before the return and filing of it, the Court hath nothing before them upon record to judge upon.*

Where an Endictment of forcible entry is quaſhed, the Court upon motion, doth uſually grant the party Endicted, a Writ of *Rereſtitution*, to reſtore him to the poſſeſſion of the Land: yet the Court may (if they pleaſe) ſettle the poſſeſſion of the Land in queſtion, according to their own diſcretions: *viz.* where they ſhall conceive the moſt right to be for the poſſeſſion. *Mich. 22. Car. B. r. And they do uſually make Rules accordingly.*

There ought to be no Reſtitution or Rereſtitution granted of the poſſeſſion of Lands, where it cannot be grounded upon ſome matter of Record. *Hill. 22. Car. B. r. Appearing to the Court.*

A Writ of Reſtitution lyes, to reſtore one to the place of one of the Common Counceil of *London*, or to the place of a Conſtable, if he be illegally put out of ſuch a place. *Trin. 22. Car. B. r. Or to a Churchwardens place, or to a Recorders or Town-Clerks place, and generally to any publick Office, or place of profit, dignity, or truſt, but not to a private Office or place, which concerns not the Common-wealth; but there the party injured is put to his Action at Law for the recovery thereof.*

The

The words *remisit* and *relaxavit*, expressed in a Charter of pardon, granted by the King unto one for a felony committed by him, do not restore him unto his goods, which he forfeited unto the King by being convicted of the felony: but there ought to be the word *restituit*, which doth properly and in its genuine signification, import a Restitution to a thing which he formerly had, but then hath not: whereas the words *remisit & relaxavit*, doth properly signifie the remitting or releasing of the claim which one hath to a thing, which is in his possession to whom the release is made. *Trin.* 23. *Car. B. r.* Vide Title Pardon.

The proper nature of a Writ of Restitution is, to restore the party that hath it, unto the possession of a free-hold or other matter of profit. *Trin.* 23. *Car. B. r. Yet this doth not generally hold, for one may have a Writ of Restitution, in some Cases, to be restored to a place of no profit, as is before expressed*, viz. *to an office of dignity or publick trust.*

The Law doth oftentimes restore the possession to one without a Writ of Restitution: to wit, by a Writ of *Habere facias possessionem*, and otherways, in common course and proceedings of justice. *Trin.* 23. *Car. B. r. Upon a Tryal at Law.*

A Writ of Restitution, is not properly to be granted, but in such Cases where the party cannot be restored by an ordinary way of justice or course of Law, and many times such Cases do happen. *Trin.* 23. *Car. B. r. For where ordinary Remedies may be had, extraordinary are not to be resorted unto.*

If one be Endicted for a forcible entry, and the party Endicted do traverse the Endictment, he cannot have restitution granted unto him, before a Tryal, and

and a Verdict, and judgment alſo given for him, although the Endictment be erroneous. *Mich.* 23. *Car. B. r. Mich.* 24. *Car. B. r. For it is too late to move to quaſh the Endictment after he hath taken his traverſe, and ſo the Endictment muſt ſtand good againſt him till the Tryal, until the right be determined in an ordinary way of tryal, which he hath by his Traverſe put himſelf upon.*

The Juſtices of Peace only before whom an Endictment of forcible entry is found, muſt give the party Reſtitution who was put out of poſſeſſion by force, for they have beſt conuſance of the matter, and not other Juſtices of Peace of the County: but the Judges of this Court may grant a Writ of Reſtitution, though the Endictment was not found before them. *Hill.* 23. *Car. B. r. For they have a ſuperintendent power over all* England, *and have power to examine the form in Court, and to make rules accordingly to juſtice in the Cauſe*, viz. *If the Endictment be removed into this Court.*

Where a Judgment for Land is reverſed in this Court by a Writ of Error, the Court may grant a Writ of Reſtitution to the Sheriff, to put the party in poſſeſſion of the Land recovered from him by the erroneous judgment. *Paſc.* 24. *Car. B. r. For part of the reverſal of an erroneous judgment is, that the party againſt whom the judgment was given, be reſtored to all that he hath loſt by the judgment; which is to be done by the Sheriff, who put him out of poſſeſſion by virtue of the* habere facias poſſeſſionem, *directed to him upon the erroneous judgment.*

There may a Writ of Reſtitution be granted to one that ſtands endicted for a forcible entry, after he hath Traverſed the Endictment, and before the Tryal, if

there

there do appear to be apparent delay in the proceeding of the Defendant upon the traverſe, elſe not, as is aforeſaid. *Trin.* 24. *Car. B.* 1. *And if it ſhould not be ſo, it might prove miſchievous to the party concerned.*

There cannot be a Writ of *Rereſtitution* granted, where there doth not appear to have been a Writ of Reſtitution formerly granted in the Caſe. *Mich.* 1650. B. S. *For the very word* Rereſtitution *doth imply, that there was a Writ of Reſtitution formerly granted, and an ouſting of the Party ſince the Writ of Reſtitution executed.*

A Writ of *Rereſtitution* may be granted upon a motion for it, if the Court ſee cauſe to grant it. *By* Ask *Juſtice.* Paſc. 1650. B. S. 2. *Maii. And how much further may it be proceeded in this way, if it may be ſo.* Q.

Upon an endictment of forcible entry found againſt the party, if he do neither traverſe nor plead to the endictment, the party put out of poſſeſſion may be reſtored to his poſſeſſion without moving the Court. *Paſc.* 1650. *B. S.* 22. *Maii.* Q. *By whom.*

Rule.

If a Rule of Court be made betwixt parties by their Conſent, although the Court would not have made ſuch Rule without their Conſent, yet if either Party refuſe to obey ſuch a Rule made, the Court will upon motion grant an Attachment againſt the party that diſobeys the Rule for other party if he deſire it, for this diſobeying the Rule is a trifling with the Court and a Contempt to the authority thereof, to which by their Conſent they ſubmitted themſelves.

In a Caſe between *Middleton* Plaintiff, and Sir *John Lenthall* Defendant, upon a Rule made by their Conſents that Sir *John Lenthall* ſhould Seal a Releaſe of Errors upon a Judgment. *Hill.* 1655. *Jan.* 23. *B. S.*

The Court will not make a Rule for a thing which may be done by the ordinary courſe of the Court: and if the Court be informed that they have made ſuch a Rule, they will vacate it. *Mich.* 22. *Car.* B. r. *For the Court is not to be troubled with needleſs motions, and to do impertinent and uſeleſs things, for this is not for the honour of the Court, and it doth put the Client to needleſs trouble and charge.*

The Attorneys are bound to obſerve the Rules of the Court, for if they ſhould not, other Attorneys would not know what to do in their Clyents Cauſes, nor the Judges how to judg of the legality or illegality of the proceedings in Cauſes. *Mich.* 22. *Car.* B. r. *For to proceed in any thing without a Rule, is to walk in the dark, and tends to bring things to confuſion, and it is a Contempt to the Court, to diſobey the Rules of it.*

If the Court do make a Rule which was grounded upon an Affidavit, he that will move the Court againſt this Rule, muſt bring in the Affidavit into Court upon which the Rule was made. *Mich.* 22. *Car.* B. r. *That the Affidavit may be read in Court, to put the Court in mind for what reaſons they made the Rule, and whether there be ſtronger reaſons to vacate it, then there was for the making it, or not, which without the Affidavit cannot be done.*

The Plaintiff and Defendant are both bound at their peril, to take notice of the Rules made in Court touching the Cauſe depending between them.

Hill.

Hill. 22. *Car.* B. r. *Except part of the Rule be, that one party ſhall give notice to the other of the Rule made againſt him, and then are they not bound to take notice of them without notice given of them.*

The Court ought not to give a Rule to any Priſoner in the Kings Bench Priſon, to go at large, except ſuch a priſoner have ſuits in Law of his own depending, at the time of the Rule made. *Paſc.* 23. *Car.* B. r. *And in ſuch a caſe it is uſual to give him leave ſo far as to ſollicite his cauſes only.*

If there be divers Rules of Court made in a Cauſe, and one of the parties intends to move the Court upon a Rule formerly made, he ought alſo to ſhow the laſt Rule made in the Cauſe. *Paſc.* 23. *Car.* B. r. *For elſe the Court cannot underſtand how far the Cauſe hath been proceeded in, nor how it ſtands in Court upon the whole matter.*

The Court will make ſuch a Rule, by the conſent of both the parties, which without their conſent they would not have made. *Paſc.* 23. *Car.* B. r. *For, Conſenſus partium tollit errorem, and neither party hath cauſe to complain, for volenti non fit injuria.*

The Court will not make a Rule for a priſoner that is not impriſoned in the Kings Bench Priſon. *Paſc.* 23. *Car. For that only is the priſon which properly belongs to this Court, and of which this Court hath juriſdiction over, and conuſance of the cauſes of the priſoners there.*

Any priſoner in the Kings Bench Priſon may have a Rule of Court, every day to go at large, if ſuch priſoner hath buſineſs in Law of his own to follow: but ſuch Rules do only extend to give him leave to go and to inſtruct his Councel, and not for him to go elſewhere at his pleaſure. *Paſc.* 23. *Car.* B. r. *Though under colour of ſuch Rules the priſoners*

ſoners do too often go at large upon other occaſions then their Rules do give warrant for.

Rules of Court ought to be interpreted according to rule and order, and not incertainly. *Mich.* 23. *Car.* B. r. *For were it otherwiſe, they would become ſnares to intrap, and not Rules to order the proceedings of the Clients.*

One is not bound to take notice of a particular Rule of Court, except he have particular notice given him of the Rule. *Paſc.* 24. *Car.* B. r. Q. *Tamen. For it ſeems every one ſhould be conuſant, how the Court proceeds from time to time in his cauſe depending there, and the rather becauſe the Court uſeth not to make any ſuch Rule except the party againſt whom the Rule is made, had notice that the Court would be moved to grant ſuch a Rule.*

The Preignotaryes of the Common Pleas will not make a Certificate to this Court of their proceedings there, without a Rule of this Court to enjoyn them to do it. *Trin.* 24. *Car.* B. r. *But then they are to do it for the better informing of this Court, and that the courſe of Juſtice may not be interrupted or delayed for want of ſuch a Certificate as the cauſe requires.*

If a Rule of Court be made, and it is not drawn up and Entred the ſame Term it is made, the Clerk will not draw it up afterwards until the Court be moved again. *Paſc.* 1656. B. S.

Paſc. 1659. By Glyn *Chief Juſtice. If Writings be brought into the Court by Rule of Court, upon a motion the Court will make a Rule to deliver them out, if there be occaſion for them, but if they be brought in by agreement of the parties in private, the Court will*

make

make no Rule in it, for without a Rule the Court is not poſſeſſed of them.

A Rule made in a Judges Chamber muſt be entred in the Office, or elſe it is of no force to ground a motion upon. *Paſc.* 1650. *B. S.* 10. *Maii. But then it is accounted the act of the Court.*

If a priſoner have a day Rule, to permit him to go abroad, yet he ought not by vertue therof to go into the Country, except it be in caſe where he hath buſineſs in Law there, then depending in Court. *Mich.* 1650. *B. S.* 12. *Nov.*

Rejoynder.

If the Defendant do in his Rejoynder depart from his Plea pleaded, in bar this Rejoynder is not good. *Mich.* 22. *Car. B. r. For this is to ſay and unſay, which the Law doth not allow, for Pleas muſt be plain and certain, and by the doing thereof the cauſe depending is hindred from coming to a certain iſſue.*

One ought not to Rejoyn upon ſuch words which are not contained in the Declaration or Replication. *Mich.* 23. *Car. For that is for the party to frame a diſcourſe of his own, and not to anſwer the Plaintiffs matter alledged, and ſo is to no purpoſe.*

Remainder.

A contingent Remainder may be deſtroyed, by deſtroying the particular eſtate upon which it depends. *Mich.* 22. *Car. B. r. For take away the foundation that ſupports the building, and the building muſt needs fall, and ſo it is in this caſe.*

A Remainder is a residue of a particular thing going before; and yet in some case there may be a Remainder without a particular estate *in esse* to support it; as it is in the Case of a Use in Remainder. *Hill. 22. Car. B. r. But this is not by the Common Law, but by the Statute.*

Residuum est ultima pars diversorum particularium. *Trin. 23. Car. B. r.*

Revocation.

A Revocation of Letters of Administration may be without a seal. *Mich. 22. Car. B. r. For it is but to signifie the pleasure of the ordinary, touching the administration of the goods of the intestate: but the Letters of Administration must be under seal, because thereby the administrator derives his authority, which ought to be fortified as well as may be; and without such Letters of Administration the Law takes no notice of him as an administrator.*

If an Attorney appear for his Clyent, and accept of a Declaration, the Clyent cannot revoke his warrant of Attorney, with an intent to stay the Plaintiffs proceedings. *Mich. 24. Car. B. r. But the Court will force the Defendant to plead, and if he do not plead, will order that judgment be entered against him for not pleading, but he may change his Attorney so he plead in due time, and plead by another Attorney in due time.*

Ryot.

If divers persons do assemble together in a peaceable manner, and after they are so assembled, do act some

ſome Ryotous act, this is a Ryotous aſſembling of them, although they did not aſſemble at the firſt in a ryotous manner, but peaceably. *Hill.* 24. *Car.* B. r. *For the ryotous act ſhall have relation to their aſſembling together, ſo far as to conſtrue it to be with a ryotous intent, although it did not appear ſo at the firſt, for the intentions of parties are beſt interpreted by their actions.*

Two perſons alone cannot make a Ryot, but there muſt be three perſons together at the leaſt to make a Ryot. *Q.* 22. *Car.* B. r. *But two perſons may make a conſpiracy, as well as a greater number.*

Recogniſance.

A Recogniſance entred into in the Common Pleas, is entred ſpecially; but a Recogniſance entred into in this Court, is entred generally. *Paſc.* 23. *Car.* B. r. *Yet both ways are good, for the entry makes it not a Recogniſance, but the act of the party that did acknowledge it.*

Roll.

The Plea Roll is of more credit and eſteem in the Court then the Eſſoign Roll, for the Plea Roll is the Roll of the Court. *Paſc.* 23. *Car.* B. r. *And upon Record there.*

If a Writ of Error be brought to reverſe a Judgment, it is not neceſſary to mark the Roll; yet if it be not marked, that thereby the Attorney on the other ſide may take notice of the bringing of the Writ of Error, nor the Attorney on the other ſide, hath notice given him of the bringing of the Writ of Er-

ror, if he do proceed and take out execution upon the Judgment, it is no contempt to the Court. *Mich.* 1649. B. S. *For it ſhall not be preſumed he knew there was a Writ of Error brought: yet though it be no contempt in him to take out the Execution, yet the Execution ſhall be ſuperſeded,* quia improvidè emanavit, *for by bringing of the Writ of Error, the hands of the Court where the judgment was given, were foreclo-ſed from proceeding any further; and ſo it was improvidently done for them to grant out Execution after the Writ of Error brought and allowed.*

Replevin.

A Replevin ought to be certain, in ſetting forth the number and kinds of the Cattel diſtrained, or elſe it is not good; becauſe if it be incertain, the Sheriff cannot tell how to make deliverance of the Cattel, if a Writ be directed to him for that purpoſe, becauſe he knows not particularly what the Cattel were that were diſtrained, which ought to have bin expreſly mentioned to that intent in the Replevin. *Trin.* 23. *Car.* B. r.

Replication.

If the Plaintiff do Reply to a Plea in Bar, which is not good by his replying to it, he hath confeſſed it to be good. *Trin.* 23. *Car.* B. r. *And ſo it ſhall be now taken to be, for he hath loſt his advantage of demurring unto it, by paſſing by the defects of it, and replying unto it, and the Court will ſuppoſe he intended not to take advantage of the inſufficiency of the Plea, but to proceed to an iſſue upon the merits of his cauſe.*

If

If an Action for the breach of the condition of an Obligation be brought, and the Defendant do plead that he hath performed the condition, the Plaintiff in his Replication muſt ſhow in what particularly the Defendant hath broken this condition. *Paſc.* 24. *Car. B. r. That the Defendant may be able to give a particular anſwer to the breach aſſigned; and if he do not aſſign a particular breach, his Replication is idle, for it ſays no more then what was formerly ſaid in the Declaration,* viz. *generally, that the Condition is broken, which the Defendant in his plea denies, and therefore if the Plaintiff will not joyn Iſſue upon the Defendants plea, but will reply, he muſt there ſhow how the Condition is broken, and then he puts the Defendant to a new anſwer.*

Reſervation.

If the Leſſee for years, aſſign over all his term to another, and reſerve a Rent, the Reſervation is void. *Paſc.* 24. *Car. B. r. For by the aſſignment of the whole term, he hath no intereſt in the thing let, for the which he can challenge any Rent to be due, and the Rent muſt be due for ſome intereſt that the Aſſigner hath left in him in the thing Aſſigned, notwithſtanding the Aſſignment which cannot be here, becauſe he hath ouſted himſelf or the whole, and ſo there is no priviledge betwixt him and the Aſſignee.*

Recovery.

A Recovery cannot deſtroy a thing executory which doth depend upon a contingency. *Paſc.* 24. *Car. B. r. Becauſe it was uncertain at the time of*

the

the Recovery ſuffered whether it would ever be or no, and a Recovery cannot work upon ſo remote and uncertain an eſtate.

If a Recovery be ſuffered by Baron and Fem of Lands whereof the Fem hath an eſtate in Fee Simple, although there was no Tenant to the *precipe* of the Lands, yet this Recovery ſhall be a good *eſtaple* againſt the Baron and Fem and their Heirs, but it would be otherwiſe, if the Lands had been Entailed at the time of the Recovery. By *Rolle* Chief Juſtice. *Mich.* 1650. *B. S.* 8. *Nov. Becauſe the Heir in tail comes in* per formam doni, *and not as Heir to the Fem at the common Law.*

It is not neceſſary for the Judge to examine a Fem Covert, when ſhe joyns with her husband to ſuffer a Recovery of her own Lands, becauſe it ſhall be ſuppoſed ſhe doth it freely and voluntarily; for the Law uſeth to make the beſt interpretation of things; yet it is prudential to do it, becauſe it may fall out that the Fem may be brought by fraud or force to do it, and the Law doth not favour the gaining of eſtates by force or fraud. *Trin.* 1651. *B. S.* By Rolle, *and he ſaid that he uſed to do it. I ſuppoſe it is meant of Lands in Fee Simple.*

Releaſe.

If the Defendant in an *ejectione firmæ*, will not defend the title of the Land in queſtion in caſe the Verdict paſs againſt the Plaintiff, the Ejector may Releaſe the coſts to the Plaintiff. *Hill.* 1649. *B. S.* 11. *Feb. For he is the Defendant in Law, although the title do not concern him, and it is the others fault that he was not himſelf made Ejector to defend the title,*

title, by which means he might have had the costs.

One is not bound to give a Release unto the Sheriff for moneys which he receives from him, which he levyed for him by vertue of an Execution; but he must give him a note under his hand, that he hath received it. *Hill.* 1650. *B. S.* By Rolle *Chief Justice.* Q. tamen. *Whether he be bound to give him such a note more then a release, for the Sheriff is an Officer of the Law, and upon payment of the money, the Law gives him his discharge.*

Recital and Misrecital.

If a Statute be Misrecited in pleading in a matter which goes to the ground of the Action, which is brought upon the Statute; it is not helped after a Verdict, by the Statute of *Jeofailes*; but if it be Misrecited only in a circumstantial matter, and which goes not to the ground of the Action, it is helped after a Verdict by that Statute. *Trin.* 1650. *B. S. For the Statute helps only matters mispleaded in matter of form, and not matters of substance, vid.* Jeofailes *tit. Pleas and Pleading.*

Report.

By the custom of the Court, the Secondary ought not to make any report (of any matters referred unto him by the Court) upon the last day of the Term, for that day is properly appointed for motions only. *Trin.* 1650. *B. S. And if there should grow any question upon the report, there would be no time to be given to the party concerned to speak to it that Term, so that the matter cannot be determined then, and so the report is to no purpose.*

Re-

Reverſion.

If one have a Reverſion expectant upon a Leaſe for years, he may make a Leaſe of this Reverſion unto the Leſſee for years, for one year, and after make a Releaſe in Fee to the Leſſee for years of the Reverſion, and by this conveyance, the Reverſion in Fee will paſs to the Leſſee. *Mich.* 1650. *B. S. For by this Leaſe and Releaſe all the Eſtate in the Reverſion is out of the Reverſioner and in the Leſſee.*

Reference.

It was ſaid, *Hill.* 1658. to be the uſual practice of this Court, ſince the new regulation of the Chancery, in an Action of debt upon an obligation, if the Defendant do before he pleads offer to pay the Principal and Uſe Money and Charges to the Plaintiff, to refer the whole matter to the Secondary to ſtate the buſineſs betwixt them, and to ſtay the proceedings at Law in the mean time.

Matters of Fact in difference betwixt party and party in a cauſe depending in Court, are not to be Referred to the Secondary, for ſuch matters are tryable by the Jury who are to try the cauſe, but matters concerning the due proceedings, or undue proceedings in the cauſe, by either of the parties are properly to be referred unto him, and for him in ſome ordinary caſes to compoſe the differenees betwixt them, and in others to make his report to the Court how the matters do ſtand. *Paſc.* 1650. *B. S. That they may ſettle the differences according to Rules and Orders of the Court.*

If

If a matter in difference betwixt the Plaintiff and the Defendant be referred to the Secondary, and one of the parties will not attend at the time appointed, to hear the buſineſs referred; the other party may proceed in the Reference alone, and get the Secondary to make his report without hearing of the other party. *Trin.* 1651. *B. S. For one party cannot compel the other to attend; and therefore ſuch References would many times take no effect for want of the preſence of both parties, if a report may not be made notwithſtanding one of them refuſeth to attend; and if he be prejudiced by not being heard before the Secondary, it is his own fault that would not attend as the Rule directed.*

Right.

Lands between the high water Mark and the low water Mark do appertain to the Lord of the Mannor next adjoyning, of Common Right. *Paſc.* 23. *Car. B. r.* By Rolle. Q. tamen, *Whether they do not rather belong to the King, for it hath ſo been held, except the Lord can claim ſuch Lands, by any particular Grant from the Crown.*

Reddidit ſe.

If a Defendant render himſelf in diſcharge of his Bayl after Judgment, yet if the Plaintiff commit him not in execution in three Terms following, he ſhall be diſcharged upon common Bayl as if he were committed for want of Bayl upon action. Per Magiſtrum Liveſey, & al. &c. P. 21. *Car.* 2. Regis.

If

If the Defendant render himſelf to cuſtody in diſcharge of his Bayl upon the day of the Return of the ſecond Sc. Fa. againſt the Bayl ſedente Cur. or if an Action be brought upon the Recogniſance, if he render himſelf upon the day of the return of the Proceſs againſt the Bayl ſedente Cur. the Bayl are diſcharged. P. 21. Car. 2. R. Per Magiſtrum Liveſey, & al.

If the Defendant render himſelf to the Marſhal in diſcharge of his Bayl, and the Bayl here be diſcharged by the Secondary, no Sc. Fa. can afterward be ſued out upon that Recogniſance. P. 21. Car. 2. R. Per Magiſtrum Liveſey, & al. &c.

Scire Facias.

A *Scire Facias* to repeal a Patent, is well brought in the Kings Bench, though a *Scire Facias* be then depending in the Chancery, for the ſame cauſe. 3. H. 7. 7.

It was ſaid by *Glyn* Chief Juſtice, in the caſe betwixt *Newton* and *Baſpoole*, *Trin.* 1657. *That a* Scire Facias *which is taken out upon a Judgment which is only ſigned in the Office and not made up upon Record, is not good; but the Record of the Judgment ought firſt to be made up, and then a* Scire Facias *to be taken out, for before that there is no Record to warrant the* Scire Facias.

One may have a *Scire Facias* to revive a Judgement upon which no Execution was taken, if it be but ten years paſt ſince the Judgment was had, without any motion to the Court for it, and if it be

under

under ten years ſince the Judgment was had, a *Scire Facias* may be moved for to revive it at the ſide Bar; but if it be above ten years ſince the Judgement was had, a *Scire Facias* may not be had without moving the Court for it. *Paſc.* 24. *Car B. r. But the Court will not deny it, if it be moved for. The ſide Bar is a place where a rail or bar is ſet up neer to this Court below the Court in* Weſtminſter-hall, *where the Judges ſtand and reſt themſelves before the Court ſits, and where they put on their Robes, and put off their Robes; and there is another like it by the Common Pleas, and it is called the ſide bar, becauſe it is on one ſide of the Court, and not in the face of it.* Vid. *Title Judgment.*

A *Scire Facias* to revive a Judgment, ought not to be granted, if the Record be not in the Court where the *Scire Facias* was moved for. *Trin.* 24. *Car. B. r. For the Record is the Warrant for the Scire Facias, and if there be no ſuch Judgment, there is no ground to move for it.*

A *Scire Facias* ought to be directed into the County where the original Action was brought, upon which the Judgment to be revived by the *Scire Facias* was obtained. *Trin.* 1650. *B. S.* 23. *Car. B. r. For it ſhall be intended that the party againſt whom the Judgment was obtained doth inhabit ſtill in that County.*

A *Scire Facias ad audiendum errores* is not well brought before the Record of the Judgment be certified into the Court, to reverſe which, the Writ of Error was brought. 21. *Car. B. r. For there is no record in Court to warrant the granting of it, before the Record of the Judgment is certified.*

If one ſue out two Writs of *Scire Facias* one after the other, there ought to be ſeven days diſtance between

tween the firſt and the ſecond *Scire Facias*, that it may plainly appear there were two diſtinct Writs of *Scire Facias* taken forth. *Mich.* 21. *Car. B. r. It is meant upon one and the ſame Judgment, as the Courſe is.*

A *Scire Facias* ought to be as ſhort as poſſible, becauſe it is the nature of Writs to ſet forth things very briefly, and a Writ is therefore called a Brief from the Latin word *breve*, which ſignifies ſhort or compendious. *Mich.* 21. *Car. B. r. And a* Scire Facias *is in the nature of an original Writ.*

If a Scire Facias be brought againſt Bayl upon a Recogniſance in a Writ of Error generally without expreſſing the action or the condition of the Recogniſance, there the Scire Facias muſt be returnable on a general return ubicunq; but if the action and the Condition of the Recogniſance be ſet forth in the Scire Facias and appears to be by Bill, then the Scire Facias muſt be returnable at a day certain in Court. Per Magiſtrum Liveſey, & al. &c. P. 21 Car. 2. Regis.

Of latter times it hath been uſed to make out a *Scire Facias* with a *Fieri Facias* or Writ of Execution compriſed in it, againſt an Executor or Adminiſtrator; and both make but one Writ, whereas anciently a *Scire Facias* and a *Fieri Facias* were two diſtinct Writs or Proceſſes, and to be diſtinctly and ſeverally executed. *Trin.* 22. *Car. B. r. But they may make them diſtinct Writs at this day if they pleaſe. The making out of a* Scire Facias *with a* Fieri Facias *was deviſed for the ſpeedier way to obtain execution upon the Judgment.*

A *Scire Facias* may be traverſed before Judgment given upon it, but after a Judgment there can be no traverſe, for then it is too late to plead to it; but a Writ of Error may be brought to reverſe the Judgment given upon the *Scire Facias*, if the *Scire Facias* was not good upon which it was grounded. *Trin* 22. *Car. B. r.*

When a Judgment for moneys is reverſed by a Writ of Error in this Court, a *Scire Facias* ſhall iſſue againſt the Plaintiff in the Judgement reverſed, to ſhew cauſe why the Plaintiff in the Writ of Error, whereby the Judgment was reverſed, ſhould not have the moneys repayed unto him, which were recovered and levyed upon him, by virtue of the Judgment reverſed. *Mich.* 22. *Car. B. r. And to this* Scire Facias *it ſeems he may come in and plead.* Q. *whether this may not beget circuits of Actions.*

A Writ of *Scire Facias* is not an original Writ, but it is a Record at the time of the Caption, before it is entred at *Weſtminſter*, and an Action may be brought where the Caption is. *Paſc.* 23. *Car. B. r.* Q.

In a *Scire Facias* brought upon a Judgment given in the Common Pleas, it is neceſſary to ſhew before what Judge the judgment was given, but it is not neceſſary to do it in a *Scire Facias* upon a Judgment given in this Court. 23. *Car. B. r.* Q. *Rationem differentiæ.*

An old Judgment may be revived by a *Scire Facias* granted upon a motion to the Court, but if a *Scire Facias* be taken out to revive an old Judgment without leave of the Conrt, the *Scire Facias* is not good, but is reverſable. *Trin.* 23. *Car. B. r. For ſuch a* Scire Facias *is not the Proceſs of the Court,*

but a fiction of the party in abuse of the Court.

If one do not proceed upon a Writ of *Scire Facias* within a year and a day after it was taken out, he cannot after that time proceed upon that Writ, but must sue out a new *Scire Facias*, for the old Writ is discontinued. *Hill.* 1650. *B. S. Because there was no proceedings upon it in reasonable time.*

If an Administrator obtains a Judgment for a Debt due to the Intestate, and the Administrator doth afterwards dye Intestate, and letters of Administration is granted to one *de bonis non*, &c. of him that dyed first Intestate; this Administrator cannot have a *Scire Facias* to revive the Judgment obtained by the first Administrator of the first Intestate, but he must bring a new Action to recover that Debt. *Hill.* 1650. *B. S. For he is no ways party or privy to the first Judgment, but a meer stranger to it.*

There must be seven days exclusive between the Test and return of each Scire Facias against Bayl, and not one four or five days. Per Magistrum Livesey, & al. P. 21 Car. 2. Regis.

Also there must be seven days exclusive betwixt the test and return of every Capias ad satisfaciendum, to Warrant a Scire Facias against Bayl, and that the Capias ought to be delivered to the Sheriff four days before the return be out. P. 21 Car. 2. R. Per. Magistrum Livesey, & al. &c.

Statute.

He that will take advantage of a Statute by pleading it, must shew in his pleading, that he is within some

ſome Proviſo of that Statute, if the Statute which he pleads, be a particular Statute, and not a general Statute. 21. *Car. B. r.* 25. *H.* 7. *f.* 1. *For the Judges are bound* ex officio *to take notice of all general Statutes which concern all the people in general, but not of particular which do only concern particular perſons or places, except they be particularly pleaded, and ſet forth before them.*

The Statute of *primo Jac.* which concerns Attorneys and Solliciters, doth not extend to ſpecial retainers of Attorneys and Solliciters. *Mich.* 23. *Car. B. r. For that Statute is a general Statute, and not a particular.*

If an iſſue be joyned upon a Collateral point, ariſing in the pleading, and no place is alledged whence the *venue* may come, this fault is helped after a Verdict, by the Statute of *Jeofails*; but if the iſſue be not joyned upon a Collateral matter, it is not helped by the Statute, if no place be alledged; for the Statute intended not ſuch extraordinary iſſues joyned upon Collateral points to the Statute.

The Statute which concerns the returning of Juries, doth onely extend to Juries to be returned to ſerve in any of the Courts at *Weſtminſter. Mich.* 23. *Car. B. r. And not to inferior Courts.*

The Statute of 23. *H.* 8. *c.* 5. concerning Sewers, was made for the eaſe and benefit of the people, to wit, the Defendants who are proſecuted upon that Statute, and they may plead that Statute or not plead it at their election. *Hill.* 22. *Car. B. r. ſee the Statute.*

If one acknowledge two Statutes upon his Lands one after the other, and ſatisfie the former Statute, but doth not vacate it, and the Conuſee of the latter

Statute, takes out an extent upon the Lands; this extent may be avoided until the former Statute be avoided by a *Scire Facias*. *Hill.* 22. *Car. B. r. For the Law is not to take notice of private acts done between the parties, and it doth not appear that the former Statute is ſatisfied; but upon the pleading an iſſue upon the* Scire Facias, *it will appear whether it be or no.*

A Statute which is made onely in affirmance of the Common Law, that is, that doth not enact any new thing, but doth onely enact that which was provided for by the Common Law before the Act made, though it did not ſo plainly appear, is nevertheleſs a Statute, and may be pleaded as a Statute, although the Defendant hath a plea at the Common Law alſo. *Paſc.* 23. *Car. B. r. For it enacts nothing contrary to the Common Law, and may therefore well ſtand with it.*

The ancient Statutes were made upon the Petition of the Commons in Parliament unto the King; in which Petition was ſet forth that which they did deſire of the King might be enacted, and paſſed not by Bills prepared, as now they do. *Paſc.* 23. *Car. B. r.*

A Statute acknowledged upon Lands, is a preſent duty, and ought to be ſatisfied before an Obligation, which is not ſo. *Mich.* 23. *Car. B. r. For a Debt due upon an Obligation, is but a choſe in Action, and recoverable by Law, and not a preſent duty due by Law, as a Debt due upon a Statute, Judgment or Recogniſance is, upon which preſent execution is to be taken out, without further ſuit.*

It was held by this Court 5. *Car.* in *Simons* Caſe, that the Statute of 1. *Mariæ*, was repealed by the Statute

Statute of 1. *Eliz.* But *Quære*, for it was doubted by the Court, whether it be repealed in the whole, or in part onely. *Mich.* 23. *Car. B. r. Compare the Statutes.*

The Statute of 21. *Jac.* of *Jeofailes*, which is to help defects in Pleadings, doth extend to all inferior Courts, as well as to the ſuperiour Courts; for it is a beneficial Law for the people, and ſhall therefore be expounded largely, and not with a reſtriction. *Paſc.* 24. *Car. B. r. As ſome other Statutes touching the proceedings in Law are.*

The miſrecital of a Statute in pleading, in a thing which doth not concern the ground of the Action which is brought upon the Statute, is helped by the Statute of *Jeofailes. Trin.* 1650. *B. S. vid. antea tit.* Pleadings.

Although a penal Statute ſhall not be extended to equity in the expoſition of it, yet it ſhall be ſo expounded, that the true intent and meaning of it may be known. *Mich.* 1650. *B. S. For if the former ſhould be, the expoſition would be too large and arbitrary; and if the latter ſhould not be, the expoſition would be too narrow, and would extenuate the force of the Statute, and hinder the true intent and meaning thereof.*

Satisfaction.

Satisfaction pleaded to an Obligation which appears to be of a thing which was performed before the date of the Obligation, is not good. *Mich.* 22. *Car. B. r. For the date of the Obligation which creates the duty, ſhall not be intended to be after the enſealing and delivery of it, and ſo ſuch ſatisfaction*

can no ways answer the duty created by the Obligation.

Moneys that are to be paid by an Executor, by vertue of a Decree in Chancery, are not to be satisfied by the Executor before a Debt due upon an Obligation made by the Testator, and grown due after the death of the Testator. By *Rolle* Chief Justice, *Trin. 23. Car. B. b. For a Debt due by Law, is to be preferred before a Debt created by a Decree in Equity.*

Whether a Legacy given by the Testator, or a Covenant entred into by him in his life time, and broken in the time of the Executor, shall be first satisfied. *Trin. 23. Car. B. r.* Q. *In* Eeles *and* Lamberts *Case, after many arguments* pro *and* con, *and held mischievous to be determined either ways.*

A Guardian may acknowledge Satisfaction upon Record, for the Infant unto whom he is Guardian, for a Debt, which as Guardian he hath recovered for the Infant. *Trin. 23. Car. B. r. For it is reason that he that hath power given him to recover a Debt for the Infant, should have also power to discharge the party of whom it is recovered, when he hath received it of him.*

The ancient course of this Court was, that if the Defendant will make Satisfaction for that which he is sued for, to the intent that the Court may cause the Plaintiff to cease his prosecution, and may receive the Satisfaction offered, that the Defendant should come into Court before he pleads, and tender present Satisfaction, or else the Court would not receive this tender, nor order any thing in it, *Hill. 1650. B. S. But now if the Defendant do offer this satisfaction after he hath pleaded, the Court will not utterly reject it, but will upon the prayer of the party, refer the matter to*

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the Secondary to end the matter, the Defendant making full Satisfaction for the principal matter, and for coſts and damages ſuffered and expended by the Plaintiff in the ſuit.

Sheriff and Under-Sheriff.

In ſome caſes the Court will order the Sheriff to attend the Secondary of the Office, with his Book of Free-holders of the County where the Land in queſtion doth lye, that an indifferent Jury may be returned for a tryal at the Bar. *Mich.* 22. *Car.* B. r. *That is in ſuch caſes where the Court conceives the Sheriff will not return an indifferent Jury.*

A Sheriff is not bound to return a Writ directed unto him, except the party whom the Writ doth concern, do tender him his Fees for the executing of it; that is in ſuch caſes where he is allowed Fees. *Mich.* 22. *Car.* B. r. Q. de ceo. *For the very words of the Writs do enjoyn the Sheriff to make a return of them.* Mich. 22. Car. B. r. *So that it ſeems he is to return them, whether the parties concerned do call on him or not; and if he be not paid his Fees, where he is allowed to take them, he may recover them by an Action.*

A Sheriff out of his Office cannot be fined by the Court, becauſe he ceaſeth to be an Officer of the Court; but a Tipſtaff may be ſent for him, to bring him in to anſwer a miſdemeanor committed by him when he was in his Office. 22. *Car.* B. r.

The old Sheriff of a County, is Sheriff until the new Sheriff be ſworn, although he be choſen. *Hill.* 22. *Car.* B. r. *For the taking of his oath doth compleat him in his Office, and before he is ſo compleated, the*

old Sheriff is in Office; for there muſt not be a vacancy, leſt there be a failure of juſtice for want of a Sheriff.

The Under-Sheriff ought always to have his Deputy to be attendant in Court, to receive and execute their commands, and to give account to the Court of buſineſſes which may fall out concerning the Sheriff and his Office. *Hill.* 22. *Car. B. r.*

Both the Sheriffs of the City of *London*, are in Law but one Sheriff, and one of them is not onely Sheriff of *Middleſex*, and the other Sheriff of *London*, or one the Kings Sheriff, and the other the City Sheriff, as it is commonly ſaid. 11. *Feb. Hill*, 1650. *B. S.*

Every Sheriff ought to anſwer for the miſdemeanors of his Bailiffs. *Trin.* 1651. *B. S. For they are his ſervants, and ought to be under his Government, and he uſually takes ſecurity for their faithful and juſt performance of their duties in their places.*

Suggeſtion or Surmiſe.

A Suggeſtion made to the Court, that the thing for which it is libelled in the Admiralty againſt the party, was done *infra Corpus comitatus*, whereas in truth it was done beyond the Seas, is notwithſtanding a good Suggeſtion, for the Court to grant a prohibition unto the Admiralty upon; for it is but to try the juriſdiction of the Admiralty, and not the merits of the cauſe; and the Court cannot then tell whether it be true or not, but will ſuppoſe it to be true; and if it be falſe, the Plaintiff in the Admiralty may joyn iſſue upon it, and try it at the Law, and if the Verdict paſs for him, he ſhall bear his coſts, and the Court

wil

will grant a conſultation that he may proceed in the Admiralty, *Mich.* 22. *Car. B. r.* Q. *As to the Caſes.*

Matters of Record ought not to be ſtayed upon the bare Suggeſtion or Surmiſe of the party; but there ought to be an Affidavit made of the matter Suggeſted, to induce the Court to ground a Rule for ſtaying the proceedings upon the Record. *Mich.* 1650. *B. r. For the Law favours not the ſtopping of the proceedings in Law, except there be very good cauſe for it.*

Surrender.

If Leſſee for Life, do accept of a Leaſe for years, it is a Surrender in Law of his Leaſe for life. By *Rolle. Paſc.* 24, *Car. B. r. For if it ſhould be otherwiſe, the Leaſe for years would be made in vain and to no purpoſe, for both the Leaſes cannot ſtand together, and where doubtful things may have an operation by a reaſonable conſtruction in Law, the Law will ſupport them, rather then to conſtrue them to be null and to none effect.*

Superſedeas.

If a Writ of Error in ſome caſes provided by Statutes be brought, there ought not to be a Superſedeas granted to him that brings the Writ of Error, to ſtay Execution upon the Judgment which is to be reverſed by the Writ of Error, until he that brings the Writ of Error have put in ſecurity by Recognizance to proſecute with effect, and to pay coſts and damages, if the Plaintiff in the Error be Non-ſute, or the Judgment be not reverſed by the Writ of Error, but affirmed. *Trin.* 24. *Car. B. r. See the Statute.*

It

It is very hard to compel the party that brings a Writ of Error, to take out a Superſedeas, into all the Counties where he hath Lands or goods lyable to the Execution upon the Judgment; for the reverſing whereof, the Writ of Error was brought. *Mich.* 1650. *B. S.* By Rolle *Chief Juſtice. Yet it is a ſure way for him that doth bring the Writ of Error to do it, to avoid a greater trouble and charge, which may otherwiſe befall him by executing the Judgment, if he have a violent and malicious adverſary, then by taking out of the ſeveral Writs of Superſedeas.*

After a Writ of Error is brought and allowed by the Court where the Judgment was given, for the reverſal whereof, the Writ of Error is brought, the hands of the Court are fore-cloſed, that is, ſtopped from proceeding upon the Judgment any further, and there needeth no Superſedeas to be directed unto them, nor is it neceſſary to mark the Roll. *Mich.* 1649. *B. S. For every one ought to take notice of ſuch general Writs as may any ways concern them; but it is more ſecure to mark the Roll, to avoid further trouble.*

If a Writ of Error be brought to reverſe a Judgement given upon a *nihil dicit*, the bringing of this Writ of Error, is a Superſedeas to ſtay Execution upon the Judgment, notwithſtanding the late Statute that enacts that a Writ of Error ſhall be no Superſedeas to ſtay Execution upon a Judgment. *Paſc.* 1651. *B. S.* 13 *Miii. For that Statute only extends to Judgments given upon a Verdict, and not to Judgments given upon a* nihil dicit, *or upon a* non ſum informatus, *or upon a* demurrer; *for the Court will expound that Statute largely, becauſe it is not thought ſo beneficial as it was intended by the makers thereof.*

Sur-

Surprisal.

The Court is always very cautious that no person, that hath any cause depending before them, be Surprised, especially in such matters as are final and penal to the party that is surprised. *Mich.* 1649. *B. S. Because by Surprisals, the parties Surprised, are deprived of making their full defence, and thereby beget clamour and give no satisfaction, but cause more suit and trouble to the parties.*

Secondary.

Where the Secondary shall return a Jury and where not, *Vid. Jury.* 161.

Settlement.

If one hath hired a dwelling house in one Parish of 10 *l. per Annum* Rent, and be settled in that house but a small time; yet this is such a settlement in the Parish where the house is, that the Justices of the Peace have no power to make an order to remove the party setled, out of the Parish wherein he was so setled; except the party so setled be lame or blind, or likely to be suddenly chargable to the Parish where he was so setled. *Mich.* 1650. *B. S.* 11 *Nov. See the Statute* 43 *Eliz.*

Loyal

Tryal and Proceedings to it.

NOte, it is not the courſe of this Court to have Tryals at the Bar upon *Saturdays*, becauſe thoſe days are appointed for matters in Law; yet in the Caſe of *Dikes* againſt the Lady *Lake*, a Tryal was permitted to be upon a *Saturday*, becauſe the Jury were Adjourned to that day by the Court, and the Court was alſo informed that the Tryal would not be long, and ſo would little hinder the buſineſs of the day.

No Tryal ought to be had at the Bar, the ſame Term that the Defendants Plea is put in, but the Term following, by the ordinary Rules of the Court. *Hill.* 21. *Car. B. r. But it may be by ſpecial rule of Court, or in Cauſes depending on the Crown ſide, wherein the King is a party.*

In an appeal of Mayhem, the Court may judge of the Mayhem by inſpection of the party, or put it upon the Tryal of a Jury. 8 *H.* 6. 15.

This Court will grant a *Habeas Corpus* to Try a Felon at the Bar, although the Felony was not committed in the County of *Middleſex*, if there be not a Gaol Delivery in the uſual manner in the County where the Felony was committed. *Hill.* 21. *Car. B. r. This is done for the expedition of Juſtice in puniſhing of Offendors.*

A Tryal in that Court where the iſſue Tryed was not joyned, is not a good Tryal. *Hill.* 21. *Car. B. r. For there was nothing before them to Try, and ſo it was* Coram non judice.

Where the Plaintiff will not Try his cauſe in ſuch due time as he ought to do, by the Rules of the Court

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the Defendant may upon warning given thereof to the Plaintiff proceed to the Tryal of it himſelf by Proviſo. *Hill.* 21. *Car. B.r. That he may free himſelf from the Action that is brought againſt him; this is called a Tryal by Proviſo, and is given by the Statute.* See the Stat.

Juſtices of Peace may by their Commiſſion Try a murder, at the quarter Seſſions, committed in the County where they are Juſtices. *Paſc.* 22. *Bar. B.r. But they do not often do it, but leave ſuch matters to be Tryed by the Juſtice of the Gaol Delivery at the Aſſizes, that ſuch Tryals may be more ſolemn in the eye of the Country.*

If any of the Defendants Witneſſes to be uſed at a Tryal, do live above forty miles diſtant from *London*; the Plaintiff by the Rules of the Court ought to give the Defendant fourteen days notice of the Tryal before he try his cauſe. *Paſc.* 21. *Car. B. r. That the Defendant be not ſurpriſed for want of ſufficient time to get his Witneſſes to be at the Tryal; which fourteen days is accounted a convenient time for the doing thereof.*

Upon a Tryal at the Bar, when the Jury is at the Bar, and the Court ready to proceed, and the panel of the Jurors names is delivered to the Secondary, he bids the cryer call the Defendant, which he doth, and if his Councel ſay they appear, then the Secondary bids both parties in French, *gardes voſtre challenges*, that is, take heed to your challenges, and then proceeds to ſwear the Jurors; but if the defendant doth not appear after thriee calling by the Cryer, the Plaintiffs Councel do pray the Court the Verdict may be taken by default. *Trin.* 24. *Car. B. r. It is called a Verdict by default, becauſe if it paſs againſt the Defendant,*

where

where the Defendant had right, and might have defended himſelf; it is not the fault of the Court, or Jury, but his own, that would not appear and defend his cauſe, but ſuffers the Verdict to be taken againſt him for lack of appearance, whereby he is concluded guilty.

Where a Tryal is had by Proviſo, the Plaintiff may be called before the Jury is ſworn, if the Defendant do require it. *Trin. 22. Car. B. r. For the Plaintiff is as it were in the place of the Defendant, becauſe the cauſe is brought to a Tryal by the Defendant.*

The Court will not grant a Tryal at the bar, except there be oath made, that the matter to be Tryed is very difficult, or of great value. *Mich. 22. Car. B. r. In which caſes it is fit the Tryal ſhould be at the Bar, where Tryals are more ſolemn, and where more time may be ſpent in the Tryal then can be at the Aſſizes; but otherwiſe this Court is not to be troubled with Tryal of Cauſes, becauſe the Court is thereby hindred in their proceedings in matters of Law, which are the proper buſineſſes of the Court, and not matters of fact.*

After a Tryal hath been in a cauſe, the Court ought not to order that there ſhall be a new Tryal of it, except it doth appear that there was a ſurpriſal in the Tryal had, or ſome fraudulent miſcarriage in it; for if they might in any caſe they pleaſe, order a new Tryal, this would be for the Court to have an Arbitrary power, which the Law will not permit. *Mich. 22. Car. B. r. For this would weaken the Common Laws, to the prejudice of the people.*

Where warning is given of a Tryal to the Attorney in the cauſe, and the Attorney cannot give notice of this warning timely enough for his Clyent to prepare for the Tryal, the Court will not force the

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Attorney to go to a Tryal, but will give longer time. *Mich.* 22. *Car.* B. r. *Becauſe the Court will not ſurpriſe any perſon, and ſuch Tryals very ſeldom do determine the buſineſs, but beget more trouble and charges to both parties, and it may be it was neither the Attornies nor his Clyents fault he had not more timely notice.*

Where there ought to have been a place alledged whence the *venue* ſhonld come, and there is no place alledged, but an iſſue is joyned, and the *venire* is *de corpore comitatus*, and a Tryal is thereupon had, this is good Tryal, and there ought not to be a repleader. *Mich.* 22. *Car.* B. r. *For here is a good pleading and a good iſſue joined and well Tryed by a Jury, and a repleader is to be only where the Pleading is vicious, and hath not brought the iſſue in queſtion, which was to have been Tryed.*

If the Court do believe that the Jury have given their Verdict againſt the evidence given unto them, they may order a new Tryal to be in the caſe. *Mich.* 22. *Car.* B. r. Q. Tamen, *For the Jury are upon their Oaths, and it may be they know ſomething of their own knowledge more then the evidence which moved them to give their Verdict ſo, and the party againſt whom the Verdict is given, is not without remedy, for he may bring his Attaint againſt the Jury if he pleaſe; yet new Tryals have ſometimes* de facto *been awarded in ſuch caſes.*

There may be a good Tryal in a cauſe, although the Defendants Plea be ill. *Hill.* 22. *Car.* B. r. *For the Tryal depends not upon the Plea, but upon the iſſue joyned; and if there be a good iſſue joyned, the Tryal is good, whatever the Plea be.*

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Where the Plaintiff will not try his cauſe after iſſue is joyned, the Defendant may try it afterwards when he pleaſeth. *Hill. 22. Car. B. r. That he may free himſelf from the ſuit.* Vide antea.

When the Defendants Attorney hath told the Plaintiffs Attorney what Plea he will plead, the Plaintiffs Attorney may give him warning for a Tryal, although the iſſue be not made up in the cauſe. *Hill. 22. Car. B. r. For after Plea pleaded, it is in the Plaintiffs choice whether he will reply or no, for if he will not reply, he may make up the iſſue when he pleaſeth, and proceed to a Tryal.*

If a Cauſe to be Tryed, be not entred into the Judges Book, before whom it is to be Tryed four days before the Cauſe is to be Tryed, the Plaintiff may enter a *ne recipiatur* in the Judges Book; that it may not be entred after that to be Tryed at that time if the Defendant pleaſe. *Hill. 22. Car. B. r. For the Cauſe ought to be entred in due time, that the Defendant may prepare for the Tryal; and he cannot well till it be entred whether the Plaintiff will proceed or no.*

If upon a Tryal to be had at the Bar, the Jury be not ready at the day to try the Cauſe, the Cauſe cannot be Tryed at the Bar any other day of that Term, without the conſent of both parties and a ſpecial rule of Court. *Paſc. 23. Car. B. r. For it would be too long and too chargable it may be, to keep the Witneſſes in Town to another day; and if they ſhould go out of Town, it might be too ſhort a time, and too much trouble to bring them up again the ſame Term.*

The agitation of a Cauſe in one Court, is no cauſe o put off the Tryal of the ſame Cauſe depending in nother Court. *Paſc. 23. Car. B. r. For the proceedings*

ceedings of one Court of Law, ought not to clash with the proceedings of another Court; but it is not so betwixt the Courts of Law and the Chancery, as it is a Court of equity.

The King may try his own cause in what Court he pleaseth. *Pasc. 23. Car. B. r. This is by his prerogative; for all Courts of Justice are his Courts, and it is not reasonable he should be streightned in his choice where he will proceed, but have liberty to sue where he pleaseth.*

A local matter generally, is not to be tryed in a foreign County, but in the County where the Cause of Action ariseth. *Pasc. 23. Car. B. r. For there may the best knowledge of the matter be had, and it is also for the greater ease of the people, and less charge; yet sometimes and upon special reason it is otherways.*

If one be committed to the Gaol for one Felony, yet the Justices may try him for another Felony, for which he was not committed. *Trin. 23. Car. B. r.* By Bacon *Justice. Vide antea Tit. Felony.*

A Decree in *Chancery* shall be tryed by a Jury and not by it self, for it is not a Record, but it is a Decree recorded. *Mich. 23. Car. B. r. And there is difference betwixt a Record and a thing Recorded, for a Record is a Judgment or other act done in a Court of Record, and Recorded there, but the* Chancery *as it is a Court of equity, is not a Court of Record, but an arbitrary Court, although it be a Court of Record as touching things agitated in the Pettibag-Office.*

Although the Plaintiff after issue joyned, and at the Assizes where he was to try his Cause, do enter a *retraxit*, yet he may try the cause at the next Assizes after if he please, for the *retraxit* doth only import, that he intends to forbear to try his Cause, *hac*

view only; and if he do not Try it at the next Assizes after, then the Defendant may, if he will, try it by Proviso; and if the Defendant do not then try it by Proviso, the Plaintiff may then give new notice of a Tryal to the Defendant, and Try it at the next Assizes following. *Mich.* 23. *Car. B. r.*

One that is not served with procels to give his Testimony at a Tryal, may not be examined upon a *voire dire* concerning any matter which concerns the Tryal. *Mich.* 23. *Car. B. r. For that is in a manner to examine him as a Witness in the Cause, which ought not to be, because he appears not as a Witness.*

A Tryal at the Bar ought not to be had for houses lying within the City of *London*. *Mich.* 23. *Car. B. r. For by their customs they may hold Plea concerning the Title of Free-holds within the City.*

If the Plaintiff give notice to the Defendant that he will Try his Cause that Term, although it be not Tryed at the day appointed, yet he is not bound to give new notice of a Tryal, if he Try it any time within that Term, for one notice is sufficient for the whole Term, and if he Try it any day that Term, it is well enough. *Hill.* 23. *Car. B. r.*

According to the old use of practice in this Court, there ought to be but ten Tryals at the Bar in *Easter* Term. *Pasc.* 24. *Car. B. r. Because Tryals at the Bar are a great hindrance to other businesses which are more proper for the Court, yet now they are encreased many times to double the number; for Tryals at the Bar are now more desired then anciently they were, for though they be more chargable, yet are they more solemn and give better satisfaction to all parties, and more likely to be final then Tryals had at the Assizes.*

If there be warning given for a Tryal, and no Jury

ty appear at the day, there ought to be a new notice given if the party will Try his Cause at another day. *Pasc. 24. Car. B. r. For else the Defendant cannot know when the Plaintiff will Try his Cause, or whether he will Try it or no.*

The consent of the owner of the Land, to make one Ejector to Try the Title of the Land, is good if it be not a plot betwixt him and the Ejector to *oust* the Lessee of the Land of his possession. *Mich. 24. Car. B. r. For there can be no other inconveniency in it.*

A Tryal at the Bar may not be had by the consent of the parties without leave of the Court. *Mich. 24. Car. B. r. For the Court is not bound Ex Officio to grant a Tryal at the Bar, but it is in their discretion to grant it, or not to grant it; and the parties may not presume to impose things upon the Court, which they may do, or not do at their pleasures.*

In a Tryal for subtracting of Tithes in an Action grounded upon the Statute of 2 *Ed. 6.* the Plaintiff ought first to begin with the proof of the value of the Tithes, before he proceeds to shew his Title to them. *Mich. 24. Car. B. r. For he must first prove there were Tithes, and of such a value taken away, which is the very ground of the Action, before he can make any Title to them; for if there were no Subtraction, there is no cause of Action.*

It is a mis-tryal for a thing to be Tryed before a Judge, who hath interest in the thing in question, and the request or consent of the parties concerned in the Tryal will not help it. *Mich. 24. Car. B. r. For such a Tryal cannot be supposed to be indifferent, for none ought to be Judge in his own cause, or in any cause wherein his own interest is any ways concerned.*

A mis-tryal is helped by the Statute of *Jeofails*, but not a void Tryal, to wit, where there is no issue joyned to be Tryed; but in such cases there must be a repleader, that the matter in question may be put in issue to be Tryed. *Mich.* 24. *Car. B. r.*

The day for a Tryal at the Bar ought to be entred into the Clerks book in the Office, *viz.* the Clerk of the Papers. *Mich.* 1649. *B. S. And before it be so entred, there ought not to be notice given of the Tryal, for the day cannot be precisely known.*

One that is a priviledged person in this Court, ought not by reason of his priviledge only to have a Tryal at the Bar granted unto him, where the Title of Land is in question, but there must be difficulty in the matter to be tryed, or else it must be of great value. *Hill.* 1649. *B. S.* 4 *Feb.*

A Tryal at the Bar ought not to be granted before the Defendant hath pleaded, and issue be joyned. *Hill.* 1649. *B. S.* 11 *Feb.* 12 *Feb.* 1656. *For before that the cause is not ready for a Tryal, nor doth it appear whether the parties intend to proceed to a Tryal or not.*

Of latter times there hath been Twenty Tryals granted to be at the Bar in *Easter* Term, but not above. *Pasc.* 1650. *B. S.* 1 *Maii. But anciently not above half the number.* Vide antea.

Although the Defendant do go to a Tryal without sufficient notice given unto him of the Tryal, and there be a Tryal accordingly, this Tryal is not binding unto the Defendant, but he may (if he please) have a new Tryal granted for want of due notice. *Pasc.* 1650. *B. S.* 19 *Ap. For the Rules of the Court are not to be broken by the consent of the parties, and it may be if he had had due notice, he might have*

been able to make a better defence, though he ventured to go to a Tryal with such proof as he then had.

By the ancient practice of the Court, all the Tryals at the Bar which are had in *Easter* Term, ought to be Tryed a fortnight before the end of the Term. *Pasc.* 1650. *B. S.* 1 *Maii. And the remainder of the Term was to be spent in matters of Law, and in other businesses more proper for the Court then the Tryal of Causes.*

In ancient times there were wont to be Tryals in Parliament by Juries, but of latter times no such Tryals have been. *Pasc.* 1650. *B. S.* 24 *Maii. This was when Parliaments were more frequently called, and sate longer then of latter times they have usually done.*

The prosecutor in an information brought in this Court, ought to bring the cause to a Tryal at his own costs, but in an Endictment which is solely at the sute of the King, he that is Endicted must bring the Cause to a Tryal at his own charges. *Pasc.* 1650. *B. S.* 24 *Maii. An information is preferred as well for the benefit of the informer as the King, and therefore it is reason he should bring it to Tryal at his own charges, but an Endictment is not so.*

If at a Tryal the Court do see that one of the parties is surprised, but not by any fault or laches of his own, but by some other casualty, they may in their discretion put off the Tryal to another time, until the party surprised may be better provided for his Tryal. *Trin.* 1650. 3 *Julii. B. S. For this is not to delay justice, but to give time that clearer justice may be done, and that suits may in more probability be put to a conclusion, which upon Surprisal is seldom seen.*

In criminal Causes, Tryals may be at the Bar in *Hillary* Term, and in *Trinity* Term, but not in other causes. *Mich.* 1650. *B. S. But only in* Michaelmas *and* Easter *Term. This was the old course, but of late in some special cases, Tryals have been granted to be at the Bar in* Hillary *Term, and* Trinity *Term, to prevent some great inconveniencies which would otherwise have hapned by deferring of such Tryals.*

The Court of *Chancery* will not stay a Tryal at Law by an injunction, when the parties are ready for the Tryal, and have expended their costs for the Tryal; but after the Tryal they will grant an injunction to stay Judgment, if there be equity in the cause, *Pasc.* 1652. *B. S.*

It is not usual to have any Tryals at the Bar but in *Michaelmas* Term, and in *Easter* Term, except it be on the Criminal side, yet in extraordinary Cases it hath been granted. For example, in a Case of the Lady *Jane Chandois* in a Trespass and Ejectment, when a Tryal upon motion was granted in *Trinity* Term, 1656. upon debate, wherein *Woodward* an ancient Clerk of the Court affirmed, that he remembred two Tryals in a *Trinity* Term. *Q. Nota.*

By Glyn *Chief Justice.* Trin. 1656. *If a Cause be removed out of an inferiour Court into this Court, it ought to be Tryed the same Term it is removed, that the party may not be delayed, for the Law doth not approve of Dilatory proceedings.*

By Glyn *Chief Justice.* Mich. 1658. *A Jury impannel'd to try an issue in one County, may try a thing that is incident to the Tryal of that issue, though it be in another County; as if an Action of Debt be brought against an Heir, and he pleads* riens per descent, *and issue is joyned upon it, the Jury may enquire of assetts in any County of* England.

By

By Glyn *Chief Justice.* Mich. 1658. *In the Case of* Bateman *and others against Sir* Job Harvey. *If a Tryal at the Bar be directed out of the* Chancery, *and at the day the parties will not agree to have the Tryal go on, this Court will not compel them to it, for this Court is not bound to enforce Orders made in Chancery.*

If the Plaintiff, in an Action of Trespass and Ejectment, do bring his cause to be Tryed at the Bar, he cannot compel the Defendant to confess the Lease, Entry, and Ouster; for the Tryal at the Bar was not granted in favour of the Defendant, but of the Plaintiff; but if the Defendant bring the cause to be Tryed at the Bar, there he must confess the Lease, Entry, and Ouster, because the Tryal was granted to be at the Bar in his favour. *Pasc.* 1652. *B. S. And therefore it shall not be in his power to hinder the Tryal for want of such confession.*

If a Cause be appointed to be Tryed in one Term, and the Plaintiff doth not then proceed in his Tryal, but rests for a year or more after, if he will after so long time Try the Cause, he must give the Defendant a whole Terms notice before his Tryal. *Pasc.* 1652. *B. S. Because by this long delay the Defendant might not think he would ever try it, and so cannot in a short time provide to make his defence.*

If a Tryal be had the last day of a Term, Judgment cannot be entred upon that Verdict until the next Term after; for Judgments must be given in the Term. By *Rolle* Chief Justice. 1652. *B. S. Nor till the four first days within the Term be passed, for so long time hath the Defendant by the Rules of the Court to speak in Arrest of Judgment.*

It was said by *Rolle* Chief Justice, that the City of *Bristol* will not bring a matter to be tryed here at the

Bar, no more then the City of *London* will. 1654. *B. S. Because it seems they have the like Priviledge to Try the Title of Free-holds within the City, as* London *hath.*

If at a Tryal at the Bar, in a Treſpaſs and Ejectment, the Plaintiff and the Defendant do conſent, that the Jury ſhall have a view of the Lands in queſtion, there can no Tryal proceed in the Cauſe that Term. By *Rolle* Chief Juſtice. 1654. *B. S. In reſpect of the view to be made, and the ſcantneſs of time afterwards for the Tryal.*

It is not uſual to grant a Tryal at the Bar the ſame Term it is moved for, but the next Term after. 1654. *B. S. Yet ſometimes upon ſpecial reaſons it is done.*

By Glyn *Chief Juſtice. Upon a motion for a new Tryal, between* Williams *and* Parrett. *Paſc.* 1656. *B. The Plaintiff is not bound to attend upon the Defendant at his Tryal, but may Try his Cauſe when he will, if he have given due notice of the Tryal.*

By Glyn *Chief Juſtice. Upon a motion for a new Tryal, between* Askue *and* Landy. *Paſc.* 1656. *B. S. Although due notice ought to be given of a Tryal, before the Tryal, yet if there be ſo many Cauſes to be Tryed on the day appointed, that that Cauſe cannot be Tryed, yet the Plaintiff needs not give new notice, but the Defendant muſt attend till it can be Tryed; but if due notice be not given, the Court will grant a new Tryal upon motion and proof thereof made.*

A voluntary Affidavit made before a Maſter of the Chancery, is not to be given in evidence at a Tryal at the Bar. *Paſc.* 1655. *For a Maſter of the Chancery hath not Authority to Adminiſter ſuch an Oath, and therefore if the party did ſwear falſly, it is not perjury,*

nor

nor can he be endicted for it, because it is Coram non judice; *and therefore such Oaths are of little credit to be given in evidence.*

If a Tryal be had, and a Verdict thereupon given, the same issue may not be Tryed again by the Jury that Tryed it before. 1655. *B. S. For it is more then probable they will give the same Verdict again.* Q. Tamen, *For there may fall out to be better Evidence given for him against whom the Verdict passed at the second Tryal, then was at the former, to move them to find contrary to their former Verdict.*

Traverse.

A Traverse ought to have an inducement to make it relate to the foregoing matter, or else it is not good and formal. *Mich.* 22. *Car. B. r. For else it cannot be known what is Traversed thereby.*

If the Court shall change the *venue*, and lay it in a County where the Cause of Action did not arise, the party may Traverse the County if he please, by saying the cause of Action, if any be, did arise in the County of *A.* and conclude, and so draw the *venue* by pleading with an *absque hoc*, that the cause of Action did arise where the *venue* is laid, into the right County where the cause of Action did arise. *Trin.* 23. *Car. B. r.*

If one will take a Traverse to a Declaration, he ought to Traverse that part of it, the doing whereof will make an end of the matter for which the Plaintiff declares, and then is the Traverse good. *Pasc.* 24. *Car. B. r. Else not, for it is to no purpose.*

Where the defendant hath given a particular answer in his Plea to all the material matters contained in the

the Declaration, there he needs not to take a Traverse. *Pasc.* 24. *Car. B. r. Pasc.* 1648. *B. S. For a Traverse is the affirming of one thing, and the denyal of another thing, and when a thing is answered, what need is there of a denyal of it? for the answering of it doth suppose such a thing was.*

Where there is a Disseisin, and a descent alledged in a Declaration, concerning the Title of Land, if the Traversing of the Disseisin will make an end of all the matter in question, there the Disseisin is to be Traversed, and not the descent; this is to be understood in such cases where by supposition the party comes to the estate by Disseisin. *Pasc.* 24. *Car. B. r.*

Where the Defendant hath confessed and avoided all the matter that is contained in the Declaration, there he needs not to take a Traverse. *Pasc.* 24. *Car. B. r. For a confessing and avoiding is a full answer of the matter alledged, and so there needs no Traverse of it, or denyal of the thing.*

Title.

If there be an Inquisition found, by which the King is Intitled unto Lands, and the Inquisition is not answered nor Traversed, the Lands found in the Inquisition, shall be supposed to be in the hands of the King. 21 *Car. B. r. Because there appears nothing to the contrary to question the Kings Title found by the inquisition.*

If one be admitted to Traverse an Office, this admission of the party to the Traverse doth suppose the Title to be in him. 21 *Car. B. r. Or else he had no cause of Traverse.*

If

If in an Action of Treſpaſs and Ejectment, neither the Plaintiff nor the Defendant can make out a good Title, then the party that hath had the moſt ancient poſſeſſion of the Lands in queſtion, ſhall be judged to have the beſt Title. *Paſc. 23. Car. B. r. Mich. 1649. B. S. For an ancient poſſeſſion of Lands is a badge of a good Title to them, where a better Title doth not appear.*

In an Action of Treſpaſs brought for taking away of goods, the Plaintiff needs not ſet forth his Title to the goods. *Paſc. 23. Car. B. r. For by the bringing of the Action, and by the Declaration it is ſuppoſed that they were in his poſſeſſion, before the Defendant took them away from him, and that poſſeſſion is Title enough to maintain the Action, and ſo he need not ſet forth any particular Title.*

He that is made Ejector to try the Title of Land, is not bound to defend the Title of the Land, and therefore if he whoſe Title is truly concerned, will not ſave him harmleſs if the Tryal ſhall paſs againſt him; he may confeſs a Judgment, and ſave himſelf of the trouble which otherwiſe may befal him by being made Ejector. *Mich. 1650. B. S. But he muſt firſt acquaint him whoſe Title is concerned, that he will do it, and then if it be done, he hath no cauſe to complain.*

Tenement.

A Tenement may be ſaid to be any Houſe, Land, or other ſuch like thing which is any way held or poſſeſſed; and it is a word of a very large and ambiguous meaning, and therefore not fit to be uſed to denominate or expreſs any thing which requires a particular deſcription. 21 *Car. B. r.*

Tipſtaff.

Tipstaff.

The Court will not grant an Attatchment against an Officer of the Court for a misdemeanor committed by him as an Officer of the Court; but one of the Tipstaffs which are Officers of this Court, called by that name, by reason of a staff which they carry tipped with silver, is to bring him into the Court. 21 *Car.* B. r. *And they are in this regard in the nature of Messengers or Pursuivants of the Court.*

If a Sheriff do commit a misdemeanour in relation to the Court during his Office, and afterwards a new Sheriff is elected, whereby the old Sheriff is out of his Office; the Court may grant a Tipstaff to the party injured, to bring him in to answer the misdemeanour; for being out of his office, the Court cannot fine him for his misdemeanour. *Pasc.* 24. *Car.* B. r. *For he is only fineable as an Officer of the Court.*

A Tipstaff is to be granted for one that is in *London* or *Westminster*, but if he be in the Country, an Attatchment is to be granted, directed to the Sheriff of the County where the party lives, and not a Tipstaff. *Hill.* 22. *Car.* B. r. & 23 *Car.* & *Pasc.* 1650. *For the Tipstaffs are Officers to attend the Court, and are not therefore to be sent out of Town.*

A Tipstaff was granted to bring in one *Cr.* an Attorney of the Common Pleas, for refusing to file a Bail, according to his promise made to an Attorney of this Court. *Nota.*

Reason.

Treason.

An intention of Treason, if it can be proved by circumstances, is Treason in the eye of the Law. *Trin.* 22. *Car.* B. r. *And it is so, to shew the odiousness and greatness of the offence of Treason, by punishing the very intentions of it, which are not punishable in other offences criminal.*

Time.

Where the Law doth not imply a certain Time for the doing of a thing, nor is there any certain time agreed upon between the parties for the doing it, there the Law doth allow the party a convenient Time for the doing of it. *Mich.* 22. *Car.* B. r. *To wit, such as shall be adjudged reasonable, for the doing of it without prejudice to him that is to do it.*

In some cases, one hath time during his life, for the doing of a thing, if he be not hastened to do it by request of the party for whom it is to be done; but if in such case he be hastened by request, then he is bound to do it in convenient Time after such request made. *Hill.* 22. *Car.* B. r.

Trespass.

An Action of Trespass, *vi & armis*, doth lye for him that hath the possession of goods or of a house or Lands, if he be disturbed in his possession. *Mich.* 22. *Car.* B. r. *For there disturbance besides the private injury done unto him thereby, is also a breach of the publick peace.*

If

If goods be taken by the Sheriff in Execution, and the goods be rescued out of his hands, an Action of Trespass lies against him that did rescue the goods. *Hill. 22. Car. B. r.* viz. *By the Sheriffs, or by the party at whose suit they were taken; and the party may be indicted for a rescous also, at the suit of the King for disturbing the peace and hindring the Execution of the Law, to the prejudice of his people and the Government established.*

One Action of Trespass may be brought for a Trespass committed in Lands which lye in several Towns or Vills. *Pasc. 23. Car. B. r. So that those Vills do lye in one and the same County, for else they cannot receive one Tryal, in respect they being both causes of action, the* venue *must come from the several Counties where the Trespasses were done.*

An Action of Trespass doth lye for a Parson against him that doth take away his Tithes after they are set forth. *Pasc. 23. Car. B. r. For after they are set forth, the Parson hath a property in Law in them, although the Parson never had an actual possession of them, but if they were never set forth, he cannot have an Action of Trespass for them for the uncertainty of them, but may bring his Action upon the Statute of 2 Edward. to recover the treble value of them.*

If divers Actions of Trespass be brought for one and the same cause, with an intent only to vex the Defendant, if the Court be moved in it, and proof thereof made by Affidavit, the Court will order the Plaintiff to joyn all his Actions into one, if it may be conveniently done. *Pasc. 23. Car. B. r. For the Judges of the Law do not favour unjust vexations of the people under a pretence of doing justice.*

If one do carry another with force into the house of a third person, he who carries the other by force into the house, is the Trespassor unto the third person, and not he who is carried thither by force; and so if one do drive my Cattel into the ground of a third person, he that drives my Cattel into the ground, is the Trespassor, and not I, who am owner of the Cattel. *Mich.* 23. *Car. B. r. For one shall not be made a Trespassor against his will, and the person to whom the Trespass is done, is not without remedy.*

If a person or goods be rescued out of the hands of the Sheriff, which he hath taken in Execution by vertue of his Office, it is at the election of the Sheriff to bring an Action upon the Case, or an Action of Trespass *vi & armis*, against him that made the rescous. *Hill.* 23. *Car. B. r. For the Sheriff is answerable in Law to answer the goods taken in Execution; and it is therefore reasonable he should have an Action against him that rescued them, to recover the value of them.*

If one bring a meer Action upon the Case, he may declare omitting the words *vi & armis*, but if the Action be a bare Action of Trespass, there he must declare that the Trespass was committed *vi & armis*. *Mich.* 24. *Car. B. r. For an Action of Trespass doth imply a breach of the peace, and a capiatur is to be entred in the Judgment against the Trespassor for his fine to the King; but in an Action upon the Case it is otherwise, for there the Judgment is, that the Defendant shall pay such Damages as the Plaintiff is Damnified by the taking of them, and be in misericordia.*

Trespasses of several natures cannot be laid together in one Action. *Mich.* 24. *Car. B. r. Because they cannot be jointly Tryed.*

Upon

Upon a recovery of Lands in an Action of Treſpaſs and Ejectment, the Plaintiff may afterwards bring an Action of Treſpaſs againſt the Defendant, for the mean profits of the Land. So it was held in the caſe between *Wilmot* and *Holden*. *Trin.* 1652. *B. S. The mean profits are ſuch profits of the Land as did grow due betwixt the time of the bringing of the Action and the time of the recovery; but more he ſhall not recover; for if he be more damnifyed, it was his own fault that he brought his Action no ſooner.*

An Action doth lye at the Common Law, for the perſon for taking away of Tithes after they are ſevered from the Land. *Mich.* 24. *Car. B. r. To wit, againſt the occupyer of the Land.* Q. Tamen. *For it ſeems before the Statute of* 2 Ed. *the ſixth, the Parſon had only remedy for his Tithes in the Spiritual Court.*

Tales.

Upon a Tryal at the Bar, if the Jury do not appear full, the Court cannot grant a *Tales de circumſtantibus*, but the Court upon a motion will grant a *Tales* returnable in ſome convenient time the ſame Term to try the cauſe. *Mich.* 22. *Car. B. r.* 1650. *B. r. For the Statute doth not extend to Tryals at the Bar, which did enable the making of a* Tales. *A* Tales de circumſtantibus, *are ſo many perſons which are returned to ſerve on Juries at the Aſſizes, to ſupply the places of thoſe that did not appear upon particular Juries.* See the Statute.

A Corporation Court cannot grant a Tales. *Paſc.* 23. *Car. B. r. For the Statute doth not extend unto Corporations.* See the Statute.

A *Tales* is not to be granted where the whole ar-

ray

ray or Jury, is challenged for want of Hundreders, but in such case the whole pannel, if the challenge be made good, is to be quashed, and a new Jury is to be returned. *Mich.* 1650. *B. S. For a* Tales *consists but of some persons to supply the places of such of the Jurors as wanted of the number of twelve, and is not to make a new Jury.* See the Statute.

If the Sheriff take Bail of one for his appearance who is not Bailable by Law, and return a *cepi corpus* thereupon, although the party do not appear, an Action doth not lie against the Sheriff for a false return; but the Plaintiff must proceed against the Sheriff by way of amercements. *Mich.* 1650. *B. S.* 26. *Nov. For in regard that the Sheriff ought not to have taken Bail, though he have taken it, yet it shall be accounted as if he had not taken Bail, and as if no return had been made thereupon.* Q.

Terms.

The Issue Terms, are *Hillary* Term and *Trinity* Term only, the other two Terms are not so called, and the Issue Terms are so called, because in them are the Issues joyned and made up, which are to be tryed at the Lent Assizes, and the Summer Assizes which do immediately and respectively follow them. *Hill.* 22. *Car. B. r.*

The four days in Term are the day of,
1. *Essoigne.*
2. *Exception.*
3. *Appearance.*
4. *Return.*
} *Hill.* 22. *Car. B. r.*

All the Term in construction of Law is accounted but one day, and therefore a Plea that is put in the last day of a Term, is a Plea of the first day of the

Term, & ſic è contra, as to ſome purpoſes. *Trin.* 23. *Car. B. r. Mich.* 1649. *B. S.*

The Term is ſaid to begin upon the firſt Eſſoigne day, which is three days before the Courts of Juſtice do ſit, and not at the firſt day of ſitting of the Courts. *Trin.* 24. *Car. B. r. Becauſe ſome buſineſſes of that Term do begin at that time, and then one of the Judges doth ſit in Court to take the Eſſoigns.*

The ſame day of the week that *Michaelmas* Term doth end, the ſame day *Hillary* Term doth always begin. By *Woodward* Clerk of the Court. *Hill.* 24. *Car. B. r.*

Toft and Croft.

A Toft is a place where an old houſe did formerly ſtand, and it alſo ſignifies a decayed houſe not inhabited. *Paſc.* 23. *Car. B. r.*

A Croft is a ſmall piece or cloſe of Land encloſed, that lies near a dwelling-houſe. *Paſc.* 23. *Car. B. r.*

Trover and Converſion.

Where the Trover of goods is in one County, and the Converſion is in another County, the Action brought for theſe goods may be laid in the County where the Converſion was; for the Converſion of the goods is the chief cauſe of the Action. *Paſc.* 23. *Car. B. r. For the Action is called a Trover and Converſion, and not a Trover only, and the Action is brought, as well for the Defendants converting of the goods to his own uſe, as for the finding and detaining of them.*

Two cauſes of Action for a Trover and a Converſion cannot be joyned in one Action. *Trin.* 23. *Car. B. r. Becauſe the cauſes of Action are for ſeveral goods,*

goods, and it may be the Trovers and Converſions were at ſeveral times and places.

An Action of Trover and Converſion may be brought for goods, although the goods for which the Action is brought, do come into the poſſeſſion of the Plaintiff that brings the Action before the Action brought. *Paſc.* 1651. 22. *Ap. B. S. For the coming of the goods into his poſſeſſion before the bringing of the Action for them, doth not purge the wrong, or make ſatisfaction for that which was done to the Plaintiff, by the finding and detaining the goods, and ſo he hath ſtill cauſe of Action, although his damages may not be very great, in regard he hath his goods again.*

Truſt.

The *Chancery* will compel one to perform a Truſt which he hath taken upon him, except it be a Truſt taken upon him for the benefit of an Alien. *Paſc.* 23. *Car. B. r. For to compel that might (in many caſes) prove prejudicial to the Common-wealth, and repugnant to the Common Law, which neither Law nor Equity ought to compel.*

The way of making Conveyances by way of Truſt, was invented to evade the Statute of uſes. *Paſc.* 23. *Car. B. r. And is not ſo much favoured in Law as plain and direct Conveyances of Eſtates.*

Ceſtuy que truſt, cannot take the profits of the Land ſetled by the Truſt, but hath only his remedy for them in equity, for the Eſtate in Law in the Land is only in the party that hath the Truſt. *Trin.* 23. *Car. B. r. And the Law takes no notice of the Truſt, &c.*

Tenure.

Lands which are granted by the King, to hold of him of his Mannor of Eaſt-*Greenwich* in *Kent*, *in capite*, is a Tenure in Socage, and the words *in capite* in the grant are void. *Trin.* 23. *Car. B. r. For theſe words* in capite *are repugnant to the Tenure created by the Grant; for all Lands that hold of that Mannor are held in Socage.*

Tender.

A Tender of Rent to ſave the forfeiture of a Leaſe, ought to be a Tender of the whole Rent, due at the time of the Tender, without any deduction of Taxes or other payments. *Trin.* 23. *Car. B. r. Becauſe there was no notice taken of ſuch deductions to be made at the time of the Covenant made; for the Leſſee covenants to pay the whole Rent.*

Tithes.

The Rector of a Church ſhall be accounted the Proprietor of the Tithes of that Pariſh, to which the Church doth belong, if the contrary be not ſhewed. *Trin.* 24. *Car. B. r. Becauſe moſt Rectors are ſo, though ſome be not.*

Tithes of Land which do not lie in any Pariſh, do properly belong to the King. *Mich.* 24. *Car. B. r. For that which no Subject can juſtly claim, is the Kings as Lord Paramount.*

Lands which lie in a Foreſt, and are in the hands of the King, are free from paying of Tithes, although they do lie within ſome Pariſh; but if they be diſforeſted, and come into the hands of another, they ought

ought by the Common Law to pay Tithes: for the not paying of Tithes for them, whilſt they were in the Kings hands, and were Foreſt Lands, is but an immunity for the time, and not an abſolute diſcharge. *Mich.* 24. *Car. B. r.*

Tithes are not due to be paid *Jure Divino*, but *per legem terræ*, ſo held by the Court, agreeing with *J. Seldons* Hiſtory of Tithes. *Mich.* 1649. *B. S.*

If Lands paid no Tithes before the Statute of *Ed.* 6. or but very inconſiderable Tithes, and afterwards the Lands for which the Tithes were paid, are improved by the owner, he ſhall only pay the accuſtomed Tithes paid for them before the improvement of them, to wit, ſuch Tithes as were paid for them for the ſeven laſt years immediately preceding the improvement; but if no Tithes at all were paid for them before the improvement, no Tithes ſhall be paid for them after the improvement. 1650. *B. S. For the improvement of Land not titheable by Law, cannot make it titheable, for this were to alter the Law.*

Venue and Venire Facias.

IN tranſitory actions the Plaintiff after the Eſſoigne day of the ſubſequent Term after the appearance ſhall not alter his own Venue, though he would pay coſts or give imparlance. Per Magiſtrum Liveſey, &c. P. 21. Car. 2. R.

A *Venire Facias* ought to be *de aliquo vicineto*, that is, neighbourhood; and therefore if the Writ of *Venire* do ſay *Venire Facias homines burgi*, it is not a good *Venire*, for it ought to be *Venire Facias homines*

de burgo. 21. Car. B. r. Q. Differentiam inter *of* and *from*. *It ſeems* homines burgi *may be any perſons whatſoever that live in a Borough or Corporation, and that* homines de Burgo *is meant ſuch men only that are not only Inhabitants there, but are alſo members or free-men of the Borough or Corporation.*

If a ſpecial Verdict be imperfect in matter of ſubſtance, there muſt be a new *Venire*, that there may be a new Verdict found, becauſe the ill Verdict doth not give the Court power to judge of the matter in Law; and ſo it is alſo if a demurrer upon an evidence be not good. By *Rolle. Mich.* 22. *Car. B. r. & Trin.* 23. *Car. B. r.* Q. *For if the demurrer be not well joyned, the matter in Law in queſtion can never come in queſtion.*

Upon a day given upon a rule to ſhew cauſe why a new *Venire* ſhould not be granted, it was moved that the *Venue* might alſo be changed, but denied; for by *Glyn* Chief Juſtice, this would be to make a new retort, and not to try the only iſſue, as the Court did intend. In the Caſe of *Studder* Plaintiff and *Elliſton* Defendant in a Trover and Converſion. *Hill.* 1655. 23. *Jan. B. S.*

A *Venire Facias* that is filed, cannot be altered without the conſent of the parties. *Mich.* 22 *Car. B. r. For the filing of it doth make it a Record, to which the parties are bound to ſtand.*

In an Action of Treſpaſs and Ejectment, the *Venue* ought to be from the Vill or Hamlet, where the Lands in queſtion do lie; and if the Lands he in no Vill or Hamlet, the *Venue* ought to be *de corpore Comitatus*, that is, from the body of the County. *Mich.* 22. *Car. B. r. For where a more particular place may not be found, a more genral muſt ſerve the turns, ra-*

ther

ther then the cauſe ſhould not come to a tryal, and ſo be a failure of Juſtice.

The Judges may alter the *Venue* from the place whence by the Law it ought otherwiſe to be, if they believe there cannot be an indifferent tryal in the County where the *Venue* was firſt laid. *Mich.* 22. *Car. B. r. By reaſon of the great power that one party hath in the County, or for ſome other cauſe; for the Judges are bound, as much as in them lies, to ſee that equal Juſtice be done betwixt all parties.*

Where the *Venue* cannot be from a Vill, Hamlet, or *lieu conus*, there it may be *de corpore Comitatus. Mich.* 22. *Car. B. r. For if it might not be ſo, the cauſe could not be tryed, and ſo there would be a failure of Juſtice, which the Law will not permit, if it may be helped without injuſtice.*

A *lieu conus*, is a Caſtle, Mannor, or other notorious place well known, and generally taken notice of by thoſe that dwell about it, and not a Cloſe or Paſture ground, or ſuch like place of no repute. *Mich.* 22. *Car. B. r. Which may be known or not be known of thoſe that inhabit near it.*

In all caſes where there is to be a ſpecial Jury, there the *Venire Facias* muſt be ſpecial. *Mich.* 22. *Car. B. r. For ordinary forms are not applicable to extraordinary proceedings.*

If the matter to be tryed be within divers places in one and the ſame County, the *Venire* ſhall be general; but if the matter be in divers Counties, there the *Venire* ought to be ſpecial. *Mich.* 22. *Car. B. r. For the general form of a* Venire *doth not warrant to return a Jury in one cauſe out of divers Counties; but in ſuch caſes to prevent the failure of Juſtice, the Court hath power to vary from the old forms, and to direct ſuch a ſpecial* Venire.

Where a certain place cannot be known whence the *Venue* ſhould be, the *Venue* is to be *de corpore comitatus*, and ſo it is where a cuſtom of the County is to be tryed; for the cuſtom runs through the whole County. *Hill.* 22. *Car. B. r. And therefore may be indifferently tryed by Jurors returned from any part of the County.*

A fault in a *Venire* is helped after a Verdict by the Statute of *Jeofails*; but where the *Venire* is wholly inſufficient, it is not helped; for it is all one as if there were no *Venire*, the Statute extends not to ſuch *Venires*. *Hill.* 22. *Car. B. r.* See the Statute.

After a Plea pleaded, and an iſſue joyned in the cauſe, the *Venue* cannot be altered, except the parties conſent to it; for by the pleading and joyning in the iſſue, both parties did implyedly agree to the *Venue* as it was laid. *Hill.* 22. *Car. B. r. Paſc.* 24. *Car. B. r. Trin.* 24. *Car. B. r.*

If the *Venue* be laid in a foreign County, and the parties proceed to iſſue in the cauſe, the Court will not change the *Venue* afterwards, although the Defendant would try the iſſue afterwards by proviſo. *Paſc.* 23. *Car. B. r. For the tryal by proviſo muſt be upon the old iſſue, and the pleadings are not to be altered.*

Where the Verdict is imperfect, ſo that Judgment cannot be given upon it, there muſt be a new *Venire* to try the cauſe *de novo*. *Mich.* 23. *Car. B. r. For the former tryal is to no purpoſe, becauſe Judgment cannot be given upon it, and ſo the Plaintiff hath not the effect of his Suit.*

If a matter in Law be depending undetermined, and an iſſue alſo joyned in the cauſe, there muſt be a ſpecial *Venire* awarded, *tam ad tryandum exitum*

quam

quam, &c. *Hill.* 23. *Car. B. r. As well to try the iſſue, as to find the damages both upon the iſſue and upon the matter put in Judgment of the Court, if Judgment ſhall be given for the Plaintiff.*

It is not neceſſary to enter the *Venire Facias* before the Tryal, but the Plaintiffs Attorney ought to give a Copy of it unto the Defendants Attorney before the tryal, if he deſire it; and after the tryal it may be entred. *Paſc.* 24. *Car. B. r. That the Defendant may conſider of it, whether it be according to Law.*

A *Venire de vicineto Civitatis*, is good without naming of the Pariſh within the City, out of which the Jurors are ſummoned, and ſo was it ſaid to be adjudged in *Gavell* and *Gippoes* Caſe, 10. *Jacob.* contrary to the Book of 5. *H.* 5. *For a City may have but one Pariſh in it, and it is ſaid it ſhall be intended to have no more Pariſhes then one, except the contrary be ſhewed.*

The party that will move to have the *Venue* changed, he muſt move for it the ſame Term the Declaration is delivered, if it be delivered above eight days before the Term ends to the Defendants Attorney; but if there is not eight days of the Term to come when it is delivered, it may be moved the next Term after the Action is brought, before the Rules for Anſwer are out. *Trin* 23. *Car. B. r. For that is the proper time to plead and joyn iſſue.*

This Court ought not to change the *Venue*, ſo that by it the cauſe cannot be tryed within the Juriſdiction of the Court. *Trin.* 23. *Car. B. r. For that is to ouſt themſelves of their own juriſdiction, and it may be to the prejudice of the Plaintiff that laid his Action there.*

If the Defendant will move to change the *Venue*, he

he muſt make oath that the cauſe of Action, if any be, did ariſe in the County where he would have the *Venue* laid, and not in the County where the Plaintiff hath laid his action; and the Defendants Attorney or his Clerk muſt make oath when he received the Plaintiffs Declaration, that the Court may not be changed contrary to the rules before mentioned. *Trin.* 23. *Car. B. r.*

Where an Action is brought for a real thing which is called a real Action, the *Venue* ought to be laid in that County where the thing is for which the Action is brought. *Hill.* 23. *Car. B. r. Becauſe it is local, and only tryable there, and is not tranſitory, which may be in any County.*

The Court will not change the *Venue* in an Action brought upon an obligation at the prayer of the Defendant. *Hill.* 23. *Car. B. r. Becauſe the Action is perſonal and tranſitory, and it is at the election of the party to lay it where he pleaſeth; yet the rules of Court for the laying of perſonal and tranſitory Actions, have not been very conſtant of later times, but the Courts do vary as they ſee cauſe.*

A Judgment given in an inferior Court, was reverſed here by a Writ of Error, becauſe the *Venire* was *Venire Facias*, &c. and not at large. *Hill.* 1650. *B. S. But ſuch a* Venire *in the Common Pleas is good: For the conſtant courſe there, is to enter the* Venire *briefly with an* &c. *but inferior Courts muſt not vary from their uſual forms.*

The Defendant may move to alter the *Venue*, although the Plaintiffs Declaration be not perfect. *Mich.* 1650. 25. *Oct. B. S. For though it be not perfect in all things, yet it may be ſo perfect, that he underſtands where the* Venue *is laid, and that is enough*

to

to ground a motion upon to alter it, if it be laid where it ought not to be.

In an Action of Debt brought for Rent due for Land, the *Venue* may not be laid out of the County where the Land lies for which the Rent is due: for the Action is a local Action, *ratione terræ*, out of which the Rent is iſſuing, and is not tranſitory. *Hill.* 1650. *B. S.* 29. *Jan.* Q. *For this is contrary to the practice and many Caſes adjudged; for the Action is brought upon the Demiſe, which may as well be tryed where the Leaſe was ſealed, as where the Land; for it is not neceſſary to deliver a Leaſe for Lands upon the ground.*

A *Venue* cannot be laid in *Wales* in a tranſitory Action, the Cauſe whereof did ariſe in *England*; becauſe this would be to remove the Cauſe to be tryed out of the juriſdiction of the Court, and then this Court can give no Judgment in it. *Trin.* 23. *Car. B. r.* *And ſo the Tryal would be fruitleſs.*

The *Venue* cannot be changed after the Defendant hath pleaded, although the Plaintiff have amended his Declaration in a principal and material part of it, after the Defendant did put in his Plea, and though the Defendant do imparle by reaſon of that amendment, for all this makes it not a new Declaration. 1650. *B. S.* *And the Defendant hath taken advantage of the amendment by his imparlance to it, whereas otherwiſe he ought to have pleaded.*

A *Venire* out of an inferior Court ought to run thus; *Ideo præceptum eſt per eandem Curiam.* Hill. 1649. B. S. 30. Jan.

In the Caſe of one *Studder* and *Elliſton* in a Trover and Converſion, upon a rule formerly made to ſhew cauſe why a *Venire de novo* ſhould not be granted,

ed, and no cauſe ſhewed, it was moved that the *Venue* might be altered. But *Glyn* Chief Juſtice anſwered, it cannot be, for this would be to make a new Record, but take a *Venire de novo*. *Hill.* 1655. *B. S.*

It is not neceſſary to inſert the Names of the Jurors in the *Venire Facias*, although it was the ancient courſe to do it. Q. *Hill.* 1649. *B. S.* 4. *Feb. So that ancient forms may be altered upon good reaſon, elſe not.*

Where the Declaration is good, but the Plea is uncertain, and yet an Iſſue is joyned and tryed upon it, this is a miſ-tryal; for there can be no Judgment given upon it, for there was no good Iſſue joyned, becauſe the Plea was uncertain: and therefore there muſt be a Repleader to bring the matter in queſtion, and a new *Venire* to ſummon another Jury to try the Cauſe again. *Hill.* 1649. *B. S.* 8. *Feb.*

A *Venire Facias* is oftentimes returned before the Plea be entred, and yet it is well enough. *Paſc.* 1650. *B. S.* 24. *Maii. For the Plea is a Plea before it is entred, ſo that there is an Iſſue to be tryed, which is a ſufficient Warrant for awarding and returning of the* Venire; *the Plea is the act of the Defendant, and the Entry of it is only the act of the Clerk.*

A *Venue* is not to be changed in an Action of Debt brought for Rent, or upon an Obligation, or in an Action of Covenant, or in an Action of Accompt. *Trin.* 1650. *B. S.* 26. *Junii. Mich.* 1650. *B. S.* 23. *Nov. Becauſe they are tranſitory Actions.* Q.

The *Venire* ought to be delivered to the Sheriff, four days before the return of it, if the Jury do dwell forty miles off; and eight days, if they dwell further off then forty miles from the place where the tryal is to be. *Paſc.* 1651. *B. S.* 13. *Maii. That he may*

have

have convenient time to ſummon them, and they to appear after the ſummons.

If the Defendant do move to change the *Venue* upon Affidavit made, that the cauſe of Action, if any be, did ariſe either in *Kent* or *Surrey* (for example) and not in *London*, where the Action is laid, the Plaintiff ſhall have his election, to lay his Action either in *Kent* or in *Surrey*, upon giving the Defendant notice, in which of them he will lay it, but ſhall not lay it in *London*. 1651. *B. S.*

The Attorneys are ſworn, not to lay perſonal Actions in foreign Counties, but in the Counties where the cauſes of them did ariſe; and the Statute doth alſo prohibit it; for the laying them in foreign Counties, doth put the people to charge for motions to alter the *Venues* into their proper Counties; and therefore it is fit the Attorneys ſhould obſerve it. *By* Rolle. 1650. *B. S. But as yet the practice herein is unſetled and inconſtant: And it may be it is not ſetled, becauſe there might great inconveniencies grow by ſetling of it, and tying up the hands of the Court, from doing that which the exigency of the caſe may require in ſome ſpecial caſes.*

Verdict.

If there be ſeveral ejectors of ſeveral parcels of Land mentioned in a Leaſe of Ejectment, the Jury ought to find this matter eſpecially. *Hill.* 21. *Car. B. r. For they ought to find matters of fact as in right they are, and here is not one Ejectment, but divers.*

A Verdict which is found againſt a Record, is a void Verdict. *Hill.* 21. *Car. B. r. For a Record is of a higher nature, and more credit is to be given unto it then unto a Verdict, and the Record which proves it*

ſelf,

ſelf, doth prove that the Verdict is falſe.

If a Verdict may be any ways conſtrued, to make it a good Verdict, there ought not to be made a conſtruction of it, to deſtroy it and make it void. *Hill. 21. Car. B. r. For the Law delights in the preſervation of things, and to make the beſt conſtruction of them, and would not have things to be done in vain, nor conſtrue them to be ſo done, where a better conſtruction may reaſonably be made.*

The Court will not take a Verdict by default, except the Plaintiffs Councel do pray it. *Hill. 21. Car. B. r. For the Plaintiff may chuſe whether he will take the Verdict or no, and therefore the Court will not take it except he deſire it.*

If the Plaintiff doth fail in proving of his Iſſue, the Verdict ought to be found for the Defendant; except the Jury do know of their own knowledge, that the Defendant is guilty. *Hill. 21. Car. B. r. So that the Jury is not ſo tyed up by the evidence, that they muſt always give their Verdict according to it: For a mans own knowledge is the beſt proof of things.*

If one of a Jury that found a Verdict, were outlawed at the time when the Verdict was found, the Verdict is not good, but may be reverſed by error. *Hill. 21. Car. B. r. For an outlawed perſon is out of the protection of the Law, and is debarred from intermedling with any Civil affairs, as a perſon excommunicated is from participating in Divine Ordinances, and is not* bonus & legalis homo, *as every Jury-man ought to be.*

If a Verdict be found for the Plaintiff, and he will not enter it, if the Defendant move the Court in it, they will compel him to enter it: and ſo it is where the Plaintiff doth refuſe to enter a Verdict

found

found for him, upon the executing of a Writ of enquiry of Damages. *Mich.* 22. *Car. B. r. For the Plaintiff ought to reſt ſatisfied with what the Law gives him, or elſe there would be no end of Suits: Or the Defendant may enter it himſelf, if the Plaintiff will not, to prevent further trouble which may happen unto him by the not entring of it.*

A Declaration that is not good, is in many caſes helped after a Verdict, by the Statute of *Jeofailes*, but where the Declaration doth not make it appear that the Plaintiff had ſome cauſe of Action to warrant his Declaration, or where ſome material and eſſential part of the Declaration is omitted, ſuch Declarations are not helped by the Statute. *Mich.* 22. *Car. B. r.* & *Hill.* 22. *Car. B. r. For that were to ſupply a Declaration, where in effect there was none, which the Statute did not intend, but only to help ſmall faults.*

If a ſpecial Verdict be drawn up contrary to the notes agreed upon by the Councel on both ſides at the Tryal, the Court upon a motion will rectifie this, if the parties cannot agree between themſelves to do it, or where the Councel on both ſides did formerly conſent to ſuch alteration, that makes it differ from the notes ſo agreed at the Tryal. *Mich.* 22. *Car. B. r.*

If the Court do direct the Jury to find a ſpecial Verdict upon the prayer of the Plaintiff or of the Defendant, the party at whoſe prayer the ſpecial Verdict was found, ought to proſecute this ſpecial Verdict, that the matter in Law in it may be determined. *Mich.* 22. *Car. B. r. Becauſe the Verdict was directed to be ſo found in his favour and at his deſire; and therefore he ought not to make uſe of this favour to delay the other party thereby, but muſt proſecute with effect.*

Where

Where the Court doth direct the Jury to find a ſpecial Verdict, one of the Councel on both parts are to agree upon the notes for it, and to draw them up, and to ſet their hands to them, and to deliver them in unto the Jury in convenient time, ſitting the Court, or elſe the Court will take a general Verdict. *Mich.* 22. *Car. B. r. That the Tryal may take ſome effect, and not be fruitleſs.*

The Chief Juſtice at *Weſtminſter-Hall* or *Guild-Hall*, or any Judge of Aſſize, may in ſome ſpecial caſe take a Verdict out of Court, which Verdict is called a privy Verdict, but then the Verdict muſt afterwards be pronounced in Court. *Mich.* 22. *Car. B. r.* Q. *How and upon what reaſons.*

If a matter in fact be left out in the notes drawn up by the Councel of the ſpecial Verdict found by the Jury, this cannot be amended afterwards, though the Court be moved in it, and although the Councel on both ſides do conſent. *Mich.* 22. *Car. B. r. For this were for the Court and Councel to make a new Verdict againſt the finding of the Jury, who have found the matter of Fact already as the notes are.*

If one of the parties whom a ſpecial Verdict doth concern, will not joyn with the other in proſecuting of the ſpecial Verdict, the Court upon a motion will order him to joyn in it; and if the Verdict be made up, and the party will not bring it in to be entred and proceeded in, the Court will grant an Attachment againſt the party. *Mich.* 22. *Car. B. r. For the Court is to ſpeed the execution of Juſtice, and to hinder all matter of delay as much as may be.*

The Plaintiff and Defendant ought both of them to appear in Court to hear a ſpecial Verdict, and the Jury is to be called, and to have the ſpecial Verdict

read

read unto them by the Secondary, and upon the reading of it, if there be any miſtake in the penning of it, the Councel on either ſide hath liberty to except againſt it, and when the Councel is agreed, then the Secondary demands of the Jury whether they agree to find it ſo, and if they anſwer they do, then the Verdict is found. *Paſc. 23. Car. B. r. And it is to be entred according to the notes ſo found.*

If the Jury will find againſt the directions of the Court any thing in matter of Law, the Court will not receive the Verdict, but compel them to find as the Law requires. *Paſc. 23. B. r. For the Court is Judge of matters in Law, as the Jury is of matters of Fact, and they ought not to find againſt the Law.*

If in an Action upon the Caſe brought for ſpeaking of ſcandalous words, the Jury do find that the Defendant did ſpeak words which are Actionable againſt the Plaintiff, and ſo give a Verdict for the Plaintiff, and it appears that the words found are not expreſſed in the Declaration, this is not a good Verdict, if there be not other words found which are in the Declaration which are actionable. *Trin. 23. Car. B. r. For the words in the Declaration are only put in iſſue to the Jury, to try whether they were ſpoken or not, and not the words which the Jury have found, and ſo they have found a Verdict upon no iſſue joyned.*

A ſpecial Verdict after the notes are agreed upon by the Councel, and drawn up, and their hands ſet unto them, is not a ſpecial Verdict, until it is allowed by the Court. *Mich. 23. Car. B. r. For they are to judge whether the matters in queſtion be rightly ſtated or not.*

Where a Verdict is imperfectly found by the Jury, there the Defendant is not to move upon it in arreſt

of Judgment, for there cannot be any Judgment given upon ſuch a Verdict, and by conſequence the motion is needleſs; but in ſuch caſe there ought to be a new *Venire* to ſummon a new Jury to try the cauſe again, becauſe the former Tryal was fruitleſs. *Mich.* 23. *Car. B. r.*

Where a ſpecial Verdict is imperfectly drawn up and entred, the Judges will not argue the matter in Law; for there can be no Judgment given in the cauſe, by reaſon that the Verdict is not good, but in ſuch a caſe there muſt be a new *Venire*, that a new Verdict may be found which may bring the matters in Law in queſtion, that ſo they may be determined, and Judgment given according to the Law. *Hill.* 25. *Car. B. r. Mich.* 1649. *B. S.* 13. *Nov.*

A cauſe depending in Court upon matter in Law, found by a ſpecial Verdict, ought not by the ancient practice of the Court to be read in Court as a Record, until books thereof be given unto the Judges of the Court, and ſo is the uſe in the Exchequer at this day. *Paſc.* 24. *Car. B. r. That the Judges may have ſufficient time to conſider of, and to ſpeak to the matter in Law, and to look into them at the time of the arguments made at the Bar, as they ſhall have occaſion.*

Every miſdemeanor of the Jury before they give their Verdict, is not a ſufficient cauſe to make void the Verdict. *Paſc.* 24. *Car. B. r. Although they may be puniſhable for them.*

If a Verdict be given where there is no iſſue joyned, this is a *Feofaile*, and there can be no Judgment given upon ſuch a Verdict, but there muſt be a repleader to bring the matter to a Tryal. *Paſc.* 24. *Car. B. r. For there was nothing tryed before for want of an iſſue joyned.*

A ſpe-

A special Verdict ought to be prepared by Councel, and delivered to the Jury to consider of before they deliver their Verdict in private to the Judge, and not the next morning when the Jury come to deliver their Verdict openly in Court. *Pasc.* 1650. *B. S.* 2. *Mail. For then the Court cannot expect till they consider of it, and without consideration it is not fit for them to give their Verdict.*

By *Glyn* Chief Justice. If the Court do order a special Verdict, and the Councel do not attend with the notes of the Verdict, or do not set their hands to them when the Jury is to give in their privy Verdict to the Judge, the Jury may the next day give a general Verdict in Court notwithstanding the direction to find a special Verdict, and so was it done in a Tryal at the Bar. *Pasc.* 1656. *B. S.*

In criminal causes, if there be any errors in the proceedings, they are not helped after a Verdict, by the Statute of *Jeofailes*. *Pasc.* 1651. *B. S.* 11. *Mail. For the Statute mentions not criminal matters, and it shall not be extended to equity, because it is in abridgment of the practice of the Common Law, and penal to the party concerned.*

Although the Court do bid the Secondary Record a non-suit, yet if it be not Recorded, the Court may take the Verdict afterwards. *Trin.* 1651. *B. S. For the non-sute is no non-sute before it be Recorded, for it is not upon Record.*

If the Plaintiff and the Defendant do consent to have the Jury find a special Verdict, the Jury ought not to refuse to find it. *Trin.* 1652. *B. S.* Q. *For they may be satisfied, there is no cause for it.*

A Verdict by default is found in this manner, in an Action of Trespass and Ejectment. When the Jury

is ready at the Bar to try the cauſe, the Secondary bids the Cryer call the Defendant, which he doth thrice; and if he do not appear, the Plaintiffs Councel do pray the Court to take the enqueſt by default, thereupon the Jury is ſworn, and the Record is read unto them, then the Plaintiffs Councel do open the Record unto the Jury, and prove the Leaſe of Ejectment, and cauſe it to be read, and then open the Plaintiffs title; and if no evidence be given for the Defendant, the Jury find for the Plaintiff, and give him damages and coſts of Sute. It is called a Verdict by default, by reaſon of the taking it in this manner upon the default of the Defendants appearance to defend his title. 1654. *B. S.*

In the Caſe of *Bateman* and *Harvy. Paſc.* 1659. It was ſaid by *Glyn* Chief Juſtice, that the Court will not compel the Defendants Councel to ſubſcribe a ſpecial Verdict; but if he refuſe to do it, the Court will order the Verdict to be entred without ſubſcribing of it.

If the Jury find a matter ſpecially, and do conclude a thing which cannot ſtand and agree with their finding, the concluſion is idle, and ſhall be taken to ſignifie nothing. By *Rolle* Chief Juſtice. 1654. *B. S. For the Verdict was perfect without the concluſion, and therefore an idle and impertinent thing ſhall not vitiate that which was well found without ſuch a concluſion.*

The Jury may find a matter of Record, if it be very ancient, or if the Record be imbezeled or cannot be found upon ſearch made for it; notwithſtanding what is held in Scholaſticas caſe to the contrary, although the Record be not ſhewed to the Jury. By *Rolle* Chief Juſtice. But otherwiſe they cannot.

By

By *Glyn* Chief Juſtice. *Trin.* 1658. If an Action be brought for 500 *l.* the Jury may find part paid againſt the Plaintiff, and part unpaid againſt the Defendant, and ſo divide the Verdict.

In the Caſe of Sir *Job Harbey* upon a Tryal at the Bar, it was controverſed whether if the Jury do find a Verdict contrary to the directions of the Court, whether it was a good Verdict or not, and whether the Court ought to take it; but at length the Court took the Verdict, though it was given againſt their direction.

Valuation.

A Jewel is not Valuable, but according to the Valuation of the owner of it, and is very incertain. *Hill.* 21. *Car. B. r.* Q. Tamen. *For it ſeems there is a certain Value for Pearls and Diamonds amongſt the Merchant Jewellers, according to their weight, bigneſs, and luſtre, although they may riſe and fall in their prices, as other merchantable Commodities do according to the plenty or ſcarcity of them, and the high or low eſteem they may be at in ſome times above others.*

If one declare in an action of Treſpaſs, for the taking away of live cattel, he ought to ſay that he took away his cattel *pretii* ſo much; but if he declare for taking away of things without life, he ought to ſay *ad valentiam* of ſo much. *Mich.* 1649. *B. S.* Q. *Differentiam inter pretium & valentiam, or price and value. It ſeems to be, that live cattel are to be prized at ſuch a price as the owner of them did in his accompt eſteem them to be worth, which is incertain; but dead things are to be reckoned at the value of the market, or as others would give for them, which may be certainly known.*

Use.

A Use and a Trust were all one at the Common Law, and did both rest in privity, but are now distinguished by the Statute of 27 *H.* 8. *Which doth direct the operation of Uses, but leaves Trusts as they were.* Mich. 23. Car. B. r.

The limitation of a Use was at the Common Law but a matter in equity, and the party concerned was only relievable upon it in Chancery. *Mich.* 22. *Car. B. r. But since the Statute it is otherwise; for now the Law takes notice of them.*

Feoffments to Uses, have the same acception as Deeds at the Common Law have, and are not to be interpreted as Wills are. *Mich.* 23. *Car. B. r. Which have a more equitable construction.*

It is all one whether a Use be raised by way of Covenant, or by way of Feoffment. *Mich.* 24. *Car. B. r. So that there be a good consideration for the raising of it; for a thing may be well done divers ways in many cases.*

Privity of estate and confidence in the party, are the two great pillars by which Uses are supported. *Pasc.* 1650. *B. S.* 18. *Maii. For without these they would soon fall to the ground and be useless.*

Usury.

Where there is not a Usurious contract preceding, although he that lendeth money, do take more then eight pound *per annum, per centum*, upon a just computing of the moneys received by him, whether it fall out by the miscalling of the parties, or by the mistake

of

of the Scrivener, this is not Uſury forbidden and puniſhable by the Statute. *Trin.* 22. *Car. B. r. For the Statute was only made to prevent Uſurious contracts which were binding in Law, and looked not at voluntary acts and miſtakes.*

Threeſcore pounds were reſerved payable upon a Mortgage of Lands for three years, payable at every ſix months by equal portions, whereas the whole Uſe money for three years, for the moneys lent upon the Mortgage according to the Statute, came but in the whole to ſixty pounds, and yet this adjudged to be no Uſurious contract. *Mich.* 23. *Car. B. r. For ſuch Contracts are not within the letter of the Statutes made againſt Uſury, and they are not to be extended to equity.*

Void and Voidable.

A thing is Void which is done againſt Law at the very time of the doing of it, and ſuch a thing done ſhall bind no perſon: but a thing which is only voidable, and not abſolutely void, is a thing which he that did it, ought not to have done it, yet when it is done, he that did it cannot avoid it, but it may by ſome act in Law be made void by his Heir, *&c.* 21. *Car. B. r.*

A Leaſe which is only Voidable, muſt be made Void by re-entry: but where a Leaſe is abſolutely void, there needs no re-entry. 22. *Car. B. r. But if the Leſſee will not avoid the poſſeſſion, the Leſſor may ſeal a Leaſe of Ejectment to try the title without any entry; but in the former caſe he cannot.*

Vill.

The Conſtable of one Vill cannot execute his Office

in another Vill. 24. *Car. B. r. For every Vill hath a particular Conſtable or Officer, and hath a confined power according to their ſeveral limits.*

There is an ancient Book called *Liber Villarum*, wherein is contained all the Vills and Pariſhes in *England*, *viz.* ſuch as were at the time of the making of that Book; but now I ſuppoſe there are many more then there was then. *Paſc.* 24. *Car. B. r. This Book, I take, it is in the Exchequer.*

Variance.

If there appear to be a material Variance between the matter pleaded, and the manner of the pleading of it, this is not a good Plea. *Paſc.* 24. *Car. B. r. For the manner and matter of a pleading ought to agree in ſubſtance, elſe there will be no certainty in it.*

View.

The Jury ought not to view the place in queſtion betwixt the Plaintiff and the Defendant, without the direction of the Court, although the parties will conſent. By *Glyn* Chief Juſtice. *Paſc.* 1656. *B. S. For the Court is to direct all the proceedings in Law in order to the Tryal, as being indifferent and beſt knowing to do that which is beſt for the expediting of Juſtice.*

The Court will grant, that the Jury ſhall view the thing in queſtion for them to try, if they doubt of it, if the Plaintiff and Defendant will conſent unto it, otherwiſe not. 15. *Nov. Mich.* 1650. *B. S. But the Jury muſt find, without a View, according to the light they have received from the evidence, as their conſciences ſhall direct them. The granting of Views is*

cauſe

cauſe of delay, which the Court will be no cauſe of, except the parties freely conſent to it.

Warden of a Church, or Church-Warden.

A Church-Warden is a Church-Warden, although he do not take an Oath, for the Oath was only enjoyned him by the Biſhop of the Dioceſs, by an uſurped authority, and he is an Officer, whereof the Common Law takes notice, and was ſo before ſuch an Oath was impoſed upon him. *Mich. 22. Car. B. r.*

Waſte.

If Waſte be done upon Lands which are let for Term of years, or for life, by one againſt whom the Leſſee can have no remedy in Law for committing this Waſte, the Leſſee is not puniſhable by the Leſſor for this Waſte, except there be a ſpecial covenant in the Leaſe, that he ſhall not commit or ſuffer Waſte to be done. *Mich. 23. Car. B. r. So that a ſpecial covenant of the party doth bind him, where by the Law he was not bound. A Foreign enemy that invades the Land, and makes deſtruction in Lands and Houſes, is ſuch an one as the Leſſee can by Law have no remedy againſt for Waſte done by him. Q. Whether by ſuch covenant he is puniſhable for ſuch Waſte.*

If Timber Trees be growing in the Hedges of a Field or Cloſe lett for years, and the Leſſee cuts them down, the Field ſhall not be forfeited in an Action of Waſte brought againſt the Leſſee; but if the Trees cut, did grow ſcatteringly throughout the Field or Cloſe, the whole Field or Cloſe is forfeited by cutting them

them down. By *German* Juſtice. *Paſc.* 1650. *B. S.* 17. *Junii.* Q. Tamen.

Withernam.

Cattel which are taken in Withernam, *ad valentiam*, that is, to the value of the Cattel that were firſt diſtrained, and ſo detained, that the Sheriff cannot execute the Replevin brought for them, is to be underſtood, not of the number of the Cattel firſt diſtrained, but according to their full worth and value. 1651. *B. S.* *For elſe he that brings the Replevin and Withernam will be deprived of his ſatisfaction he ought to have in caſe the diſtreſs were not lawfully taken.*

Warranty.

An Action doth not lye upon a bare affirmation, that the thing ſold was worth ſo much, whereas in truth it was not worth ſo much as he affirmed, becauſe it is every Shop-keepers caſe; but if he warrants it, then *è contra*. *Lekins in Cliff. Paſc.* 15. *Car.* 2. *R.* *and Yelvertons Rep. to* 20 *Harvey againſt Young accor.*

If one Warrant a Horſe, or any other thing ſold after the time of the ſale of it, ſuch a Warranty is not good to bind the party that made the Warranty, but the Warranty muſt be made at the time of the ſale, and then it is binding, becauſe it is part of the contract; but if it be made afterwards, it is but a diſcourſe, and no part of the contract. *Paſc.* 1652. *B. S.*

Writ,

Writ.

A Writ may be either a Mandatory Writ, or it may be a remedial Writ; a Mandatory Writ, is a Writ which is directed unto the Cinque Ports, or to ſome other priviledged place to enjoyn them, not to exceed their jurisdiction; but this is not a remedial Writ to the party that obtains it, conducing any ways to his obtaining of right in his cauſe depending there. For ſuch a Writ leaves them at large to do juſtice, and is rather cautionary then injunctive. *Trin.* 22. *Car. B. r. Though it may ſeem to imply ſomething to that purpoſe.*

An Original Writ is not amendable, if it be erroneous in ſubſtance, becauſe he that takes it out may have a new Original, and ſo is not without remedy. *Hill.* 22. *Car. B. r. Though the Writ be abated. But if a judicial Writ be erroneous, it muſt be amended, becauſe the party cannot have a new Writ; and if it cannot be amended, the party is without remedy as to that way of proceeding he is in.*

An Original Writ which is defective in form only is abateable, if it be not amendable by the Statute, as in ſome caſes it is, and in others not. *Hill.* 22. *Car. B. r. For Writs muſt be formal for preventing of confuſion.*

If the Prerogative Court ſhall refuſe to grant Adminiſtration according to the Teſtators Will, this Court may grant a Writ at the prayer of the party grieved to compel them to do it, and the Counteſs of *Bark-ſhires* Caſe 29 *Jac.* and the Caſe of Saint *Burien* in *Cornwal*, were cited to prove it. *Hill.* 22. *Car. B. r. Such Writ is a mandatory Writ, and yet remedial;*

remedial; ſo that a mandatory Writ may in ſome ſort be remedial.

If one bring a Writ of Ejectment, and pending the Suit, he makes an Entry into the Land for which the Action is brought, the Defendant may plead this Entry in abatement of his Writ. *Hill. 22. Car. B. r. For by the Entry he is ſuppoſed to have gained the poſſeſſion, and ſo hath no cauſe of Action-ſuit.*

A Writ without a Teſte is not good. *Hill. 22. Car. B. r. For the time may be material when the Writ was taken out, and it is proved by the Teſte.*

Writs iſſuing out of any of the Courts at *Weſtminſter* do not run, that is, are of no force within the County Palatine of *Cheſter*, or other County Palatine. *Hill. 22. Car. B. r. Becauſe they have* jura regalia *within their juriſdictions, and are not ſubject unto other juriſdictions.*

The Sheriffs Bailiff cannot execute a Writ directed unto the Sheriff, without the Sheriffs Warrant. *Paſc. 23. Car. And if he do, he is liable to an Action for acting without authority.*

Where the Sheriff is Judge of the Court, a Writ which ſhould otherwiſe have been directed unto him, ſhall be directed to the Serjeants of the Mace. *Paſc. 23. Car. B. r. That is, in ſuch places where there are ſuch Serjeants, who are the next Officers under him; for the party cannot be Judge and Miniſter alſo in a Cauſe.*

After Judgment in a Cauſe, there can no Plea be pleaded in abatement of the Writ upon which the Action was commenced. *Paſc. 24. Car. B. r. For the Writ is allowed good by the pleading and proceeding to judgment.*

In a Writ of Dower, the Tenant cannot plead *his*

petita

petita in abatement of the Writ of Dower. *Paſc.* 24. *Car. B. r. That is, that the Defendant hath demanded her Dower by another former Writ depending, for ſhe can recover but once.* Q. Tamen.

In an Action of Debt, it is a good Plea in abatement of the Plaintiffs Writ, to ſay that the Plaintiff hath received part of the Debt, for which he ſues, ſince his Action brought; but it is no good Plea in an Action upon the Caſe. *Paſc.* 24. *Car. B. r. Trin.* 24. *Car. B. r. For in Debt the Plaintiff is to recover the whole Debt he declares for; but in an Action upon the Caſe, the Plaintiff is to recover no more then he can prove he is damnified by not paying of what he demands, and the money received ſince the Action brought, can but abate the damages, and doth not deſtroy his Writ; for it was incertain at the bringing of Writ how much he was damnified; but in Debt the certainty of the thing demanded did appear.*

The Writ directed to call one to the dignity of a Serjeant at the Law, is a cloſe Writ that is ſealed up, to ſignifie it is his duty to keep cloſe his Clyents cauſe and not to reveal it; but the Writ directed to one to call him to the place and dignity of Chief Juſtice or other Judge, is an open Writ, and not cloſed up, to ſhew that his duty is to do open Juſtice unto all. *Mich.* 24. *Car. B. r. So ſaid in a Speech made by one of the Commiſſioners of the broad Seal upon the calling of a new Judge to this Bench.*

A Writ of Error brought by the Bail to reverſe a Judgment given againſt the Principal only, is abateable; and ſo is it (by *Rolle* Chief Juſtice) where the Judgment was given againſt the Principal and the Bail alſo. *Mich.* 1649. Q. Tamen. *In the latter Caſe; for the Bail may be prejudiced by ſuch a Judgment.*

If

If the party be ſued to an Out-lawry upon an Original Writ, the Writ is determined by the Out-lawry, for it hath had its full effect, which was to make the party to come in and appear, and anſwer the Plaintiff, or elſe to Out-law the Defendant, if he ſhould not appear. By *Rolle* Chief Juſtice. *Hill.* 1650. *B. 8.* Q. *If the party come in upon the Out-lawry, and reverſe it, if it be ſo.*

Where the Sheriffs Bond which he took for the Defendants appearance is put in Suit, the Writ taken out to arreſt the Defendant upon this Bond, ought to be directed unto the Coroner, becauſe the Bond is to be ſued in the name of the Sheriff. *Paſc.* 1650. *B. S.* 17. *Ap. And ſo he is accounted (in Law) to be a Party, and is not to act for his own intereſt.*

Writ of Enquiry of Damages.

The Court will quaſh a Writ of Enquiry of Damages, and not ſuffer it to be filed, if the Plaintiff do execute it without the giving of due notice of the execution thereof unto the Defendant, and put him to take out a new Writ of Enquiry. *Hill.* 22. *Car. B. r. Becauſe the Defendant was ſurpriſed thereby, that he could not make his defence in mitigation of damages ſo fully as otherwiſe he might have done.*

v: antea lib. 385 148

If it do not appear to the Court by the Return, or by ſome other way, that a Writ of Enquiry hath been executed, the Court will grant the Plaintiff a new Writ (if he deſire it) if the former Writ do take no effect. *Mich.* 22. *Car. B. r. For if it have not been executed, it is as if there had been no ſuch Writ.*

A Writ of Enquiry is to iſſue forth where a Judgment is had in Treſpaſs, Treſpaſs upon the Caſe, Replevin,

plevin, &c. upon a *nihil dicit*, or *non ſum informatus*, or upon a Demurrer, and not upon a Verdict; and this Writ is to ſummon a Jury to try what Damages the Plaintiff hath ſuſtained by the Defendant in the cauſe, becauſe the damages were not formerly aſſeſſed, the matter not being tryed by a Jury. *Hill.* 22. *Car. B. r. As they would have been by the Jury, if a Verdict had been found.*

If there be error in a Writ of Enquiry of damages, the Court upon the prayer of the party, will grant him a new Writ, but will not ſuffer the old Writ to be amended. *Paſc.* 23. *Car. B. r.*

If a Writ of Error be brought in this Court to reverſe a Judgment given in another Court, and the Judgment is affirmed in this Court, this Court may grant a Writ of Enquiry of damages, if it was ſuch a Judgment whereupon a Writ of Enquiry did lye. *Trin.* 24. *Car. B. r. Viz. a Judgment upon a* nihil dicit, *or upon a* non ſum informatus, *in Ejectment, Dower,* &c.

If upon the executing a Writ of Enquiry of Damages, the Sheriff do refuſe to ſwear and examine ſome of the witneſſes produced on either part, and yet doth execute the Writ; the Court will grant a new Writ to the party grieved, for the old Writ was not well executed. 1651. *B. S. Becauſe all the evidence offered was not heard, which ought to have been done on both ſides, that things may more clearly appear to the Jury.*

Way and High-way.

There are three Ways taken notice of, to wit, *Alta Via, Communis Via, & Via by preſcription*, that is, a High-way, a Common Way, and a Way by preſcription.

ption. *Paſc. 24. Car. B. r. And theſe may be ſeverally ſubdivided into a*

{ *Cart* / *Horſe* / *Foot* } *Way.*

If a High-way lye within a Pariſh, the Pariſh is of common right bound to repair it, except it appear that it be to be repaired by ſome other perſon, either by reaſon of tenure, or by preſcription. *Mich.* 1650. *B. S.* 24. *Oct. In regard of the conveniency of doing it, and of the benefit they have of the Way, and uſe of it above others.*

If any perſon do encloſe any part of a way or waſte, adjoyning to a High-way, he thereby doth take upon him to keep the way adjoyning in repair, for thereby he claims particular intereſt in the ſoil. 1651. *B. S. Elſe he could not encloſe it.* Q. Tamen.

Wager of Law.

The Defendant cannot Wage his Law in an Action which doth ariſe upon a realty; for there the agreement between the party cannot be ſo private, but there will be ſomething to prove it beſides the ſuggeſtion of the party, but only where the Action is perſonal, and the Cauſe private. *Trin.* 22. *Car. B. r. And therefore if an Action be brought for the Arrerages of Rent, the Defendant cannot Wage his Law, for the Rent doth ariſe out of the Land, and Sounds in the realty, and it may appear the Defendant had the Land, and the Law will preſume he was to pay rent for it.*

The manner of Waging of Law is this, He that is to wage his Law, ſtands at the end of the Bar towards the right hand of the Chief Juſtice, and the Secondary asks

asks him, whether he will wage his Law, if he anſwers that he will, the Judges admoniſh him to be well adviſed, and tell him the danger of taking a falſe Oath, and if notwithſtanding he perſiſt, then the Secondary ſpeaks words to the effect following unto him, and he that wageth his Law, doth repeat every ſentence diſtinctly after him, *Hear ye this, ye Juſtices, that* I W.S. *do not owe to* B.B. *the ſum of* (naming the ſum in the Declaration) *nor any penny thereof in manner and form as* B. B. *hath declared againſt me, So God me help*, and then he kiſſeth the book. But before he takes the Oath, the Plaintiff is called by the Cryer thrice, and if he do not appear, then the Defendant goes quit without taking his oath; but if he appear, then he muſt take his oath, and then he is diſcharged without pleading, and the Plaintiff is barred for ever. *Mich.* 22. *Car.* B. r. *If the Plaintiff do not appear to hear the Defendant perform his Law, he is non-ſuit, and then he is not barred, but may bring a new Action.* Paſc. 24. Car. B. r.

The reaſon why wager of Law is ſuffered, is becauſe the contract upon which the Action is brought being a private contract, and not to be proved, it may be intended that the diſcharge may be in private, and not to be proved otherwiſe then by the Oath of the party whom, the Law will not preſume will take a falſe Oath. *Hill.* 1649. B. *S.* 31. *Jan. And his Oath ſhall rather be accepted to diſcharge himſelf, rather then to ſuffer him to be charged upon the bare allegation of the Plaintiff.*

The Defendant cannot pray to be admitted to wage Law inſtanter after imparlance, but before he may, and then the Plaintiff cannot be non-ſuit, if the Defendant perfect his Law; but if he wage his

Law after imparlance, the Plaintiff may be non-ſuit Per Magiſtrum Liveſey & al. &c. P. 21 Car. 2. R.

If one bring an Action of Debt upon a *conceſſit ſolvere*, as it is uſed to be done in *Briſtol* and ſome other places, the Defendant may wage his Law. *Hill.* 1650. *B. S.* 5. *Feb. For his confeſſion is no proof of the Debt at the Common Law, though by a ſpecial cuſtom an Action may be brought upon ſuch a promiſe.*

If the Defendant do tender his Law in Court, and is ready to perform it, and the Plaintiff being called, doth not appear, he ſhall be non-ſute, and pay coſts, but then he may bring another action for the Debt, if he pleaſe; but if the Plaintiff do appear, and the Defendant do make his Law, then the Plaintiff ſhall never bring another Action for that Debt, but ſhall be barred for ever. *Mich.* 1650. *B. S.* 22. *Nov. For it is as much as if a Verdict paſſed againſt him, for here is all done that the Law requires towards the diſcharging of the Defendant.*

Words.

A Latine word uſed in pleading, which word doth ſignifie divers things, is nevertheleſs well uſed to expreſs that thing which is intended to be expreſſed by it, if there be an *Anglice* joyned with it. *Hill.* 21. *Car. B. r. For by the word* Anglice *it is explained what the party doth intend it ſhall ſignifie in Engliſh.*

Words which may be taken or interpreted in a general and common ſenſe, ought not to receive a ſtrained and unuſual conſtruction. *Hill.* 21. *Car. B. r. For it is likely the party that uſed them, had a plain and common meaning in them, and not a ſtrained and unuſual, and therefore the Law will take them according to common parlance.*

Words

Words which are in themſelves uncertain, may nevertheleſs be made certain by ſubſequent or following words. *Mich.* 23. *Car. B. r. Which may ſerve as a comment to explain what the ſpeaker did mean by them.*

Although Words were not Actionable in themſelves at the time of the ſpeaking of them, yet if an Action be brought for the ſpeaking of them, they may be made Actionable by the Defendants pleading by juſtifying of the words. *Mich.* 22. *Car. B. r. For it may be that in ſuch his juſtification, he may explain in what ſenſe he ſpake them, which did not appear plainly before; and where words are ambiguous, the beſt ſenſe ſhall be taken generally.*

Theſe Words, you are a Knave, ſpoken generally, will not bear an Action; but if one call another Knave, and apply the words particularly to the profeſſion of him againſt whom they are ſpoken, as to call an Attorney at Law Knave, and to apply it ſpecially to him in relation to his practice as an Attorney, an Action upon the Caſe will lye for ſpeaking of them. *Hill.* 22. *Car. B. r. For by the application of them, they import a ſpecial damage done to the party by the ſpeaking of them, in ſlandering him in his profeſſion, and leſſening of his practice.*

A word which is written ſhort or abbreviated without a daſh, is not good. *Hill.* 22. *Car. B. r. For the daſh or turning up of a ſtroke or daſh with a pen at the end of it, is the general mark or ſign to diſtinguiſh an abbreviated word from a word written at length.*

Incertain words in the Count or Declaration, may be made good and certain by a Plea in Bar. *Hill.* 22. *Car. B. r. To wit, by the Defendants taking notice of the meaning of them in his Plea; for if they be certain*

to the Defendant, they are certain enough.

The different placing of the ſame words may cauſe them to have a different ſenſe or conſtruction. *Paſc.* 23. *Car. B. r. And therefore care is to be taken in pleading, how the words uſed are placed.*

The Court ought ſo to order the words of a Will, that they may receive ſuch a conſtruction that may agree with Law, although by their miſ-placing, they cannot in themſelves receive ſuch a conſtruction. *Paſc.* 23. *Car. B. r. Ut res magis valeat quam pereat.*

Words in a Will, as they may be diverſly penned, may either deſtroy a condition precedent, or create a condition ſubſequent where there was none before. *Paſc.* 23. *Car. B. r.*

Morage of a Ship, is when the Ship lies on the ground in the More, Mire, or Mud within a Haven or Harbor, and doth not float upon the water. *Paſc.* 23. *Car. B. r.* Q.

The Anſty of the City of *York*, is that part of the County of the City which extends without the City, and is an Hundred, whic his within the juriſdiction of the City, and was added to it by Act of Parliament. *Paſc.* 23. *Car. B. r.* Vide the Statute.

The word *relaxavit* doth not amount to a ſurrender in the caſe of a common perſon, much leſs in the caſe of the King. *Trin.* 23. *Car. B. r. The verb* relaxare *whereof the word* relaxavit *is the preterperfect tenſe, ſignifies only to releaſe, which differs much from a ſurrender, as appears by* Littleton *in his Tenures.*

The word intereſt for borrowing of money, ſhall be intended eight pounds a year *per centum*, if the contrary be not ſhewed. *Trin.* 23. *Car. B. r. This was when money was at eight in the hundred; but now*

it

it ſhall be intended ſix pound in the hundred, according to the late Statute.

The words of a Statute ought not to be ſo interpreted, that thereby natural Juſtice will be deſtroyed. *Hill.* 23. *Car.* *For it is not the intent of any particular Law of a Land or Nation, to deſtroy the general univerſal Law of Nature; and therefore ſuch a conſtruction cannot be but contrary to the intent of the Lawmakers.*

The word *Simul* is not a word copulative, when it is joyned with the word *Et.* *Trin.* 24. *Car. B. r.* *But* Simul cum *are words copulative.*

Where there is a Latine word in a Declaration, which is falſely Engliſhed, the Engliſh word ſhall be adjudged void, and the Latine word ſhall ſtand. *Paſc.* 24. *Car. B. r.* Q. Tamen. *For the party that doth interpret it, knows beſt what he meant by it, and all words are but to expreſs the mind of him that ſpeaks them.*

Where ſenſeleſs words which ſignifie nothing are uſed in a Declaration to expreſs things, they ſhall be accounted void and idle, and ſhall not hurt the Declaration, if it be good without them; for no damages ſhall be intended to be given by a Jury for thoſe things which were intended to be expreſſed by thoſe ſenſeleſs words, and are not expreſſed, by reaſon of the ſenſeleſneſs of them. *Paſc.* 24. *Car. B. r.*

The word *videlicet* is uſed to explain the foregoing words in the Deed, or other writing where it is uſed; and if the words which the *videlicet* doth uſher in, be contrary to the preceding words, they are void. *Paſc.* 24. *Car. B. r.* *For then they ceaſe to be an interpreter, and become deſtructive, contrary to their nature.*

One may upon a conſideration diſſolve by Paroll, an abſolute contract. *Paſc.* 24. *Car. B. r. Viz. made by Paroll.*

One may give authority by Paroll unto another to take Livery and Seiſin for him. *Mich.* 1650. *B. S. For he is but an inſtrument or Conduit-pipe to derive the poſſeſſion of the Land to another: and it is all one as if he took the Livery and Seiſin himſelf.*

Words ambiguous ought to receive ſuch a conſtruction as may make them ſtand with Law and equity. *Mich.* 1650. *B. S. And not to be wreſted to do wrong.*

A mark made in the manner following, *viz.* ∧ which is to ſhew where a clauſe or word left out and interlined in writing ſhould come in, is called a *tra.* By *Rolle* Chief Juſtice. It ſeems to be derived from the Latine word *trahere* to draw, becauſe by it the words left out are ſignified to be there where it is placed to be drawn into the writing. 1650. *B. S. It may be alſo called a* direct *from the Latine word* dirigere.

Witneſs.

In the Caſe of *Jones* againſt *Price. Trin.* 1657. It was ſaid by *Glyn* Chief Juſtice, that although one be Bail to an Action, yet he may be a witneſs upon the Tryal of that Action. *Q. Tamen.* For it ſeems he may be concerned in the Tryal.

A Witneſs who by reaſon of ſickneſs, extreme age, or other cauſe cannot come to a Tryal, may by order of Court be examined in the Country by a Commiſſion out of the *Chancery*, or before any Judge of the Court where the cauſe depends, and the teſtimony ſo taken, ſhall be allowed to be given in evidence at

the

the Tryal. *Mich.* 22. *Car. B. r. This is admitted, that Tryals may not be hindred for lack of Witneſſes.*

If a Witneſs be ſerved with the Proceſs of this Court to give his teſtimony at a Tryal, and will not come, the Court may grant an Attatchment againſt him for his contempt to the Court, and the party may have his Action upon the Caſe, to recover the damages he received for want of his Teſtimony. *Mich.* 22. *Car. B. r.* Q. *Whether he may be proceeded againſt both ways, becauſe it is but one offence.*

The Teſtimony of one ſingle perſon, is a ſufficient Teſtimony for the King in a cauſe wherein he is concerned. *Mich.* 22. *Car. B. r. To wit, in criminal cauſes; but* Q. *Whether it be ſo in civil cauſes.*

A Witneſs that is to teſtifie on the behalf of the King againſt one that is arraigned for Felony, may not be ſworn againſt the King to give his teſtimony, but the priſoner may examine him, and deſire his teſtimony without giving him his oath. *Mich.* 22. *Car. B. r. This is admitted in favour of life.*

If divers perſons be made parties to a Suit, and ſome of them are either found not guilty, or elſe the Plaintiff will give no evidence againſt them, they may be allowed to be examined as Witneſſes in the cauſe whereunto they were made parties. *Mich.* 22. *Car. B. r. For now it appears, they are not concerned in the Suit, but are as ſtrangers and indifferent perſons, and that the Plaintiff had no juſt cauſe of Action againſt them, but it may be, made them parties to take away their teſtimony.*

He that will make uſe of Witneſſes at a Tryal, muſt get them thither at his own peril, and he ſhall not delay the other party for lack of his Witneſſes. *Paſc.* 23. *Car. B. r. For he hath his remedy againſt his Wit-*

neſſes, if he ſuffer in his Tryal by reaſon of their abſence, by bringing an Action of the Caſe againſt them for not appearing.

One that hath but a ſmall Legacy given unto him by a Will, may be allowed as a Witneſs to prove that Will; but he that hath Lands given unto him by a Will, may not be allowed for a Witneſs to prove that Will. *Paſc. 23. Car. B. r. For that were to ſuffer one to ſwear his own title, but in the former Caſe the Law will not intend that any one will forſwear himſelf for a ſmall matter.*

It is not requiſite for Witneſſes to a Will, to ſet their hands unto it. *Paſc. 23. Car. B. r. Nor for Witneſſes to a Deed to do it, but it is very prudential to do it, the better to keep things in memory. For if they depoſe that they ſaw the Deed executed, or the Will publiſhed, it is ſufficient proof, though their hands be not ſubſcribed.*

A man may be a credible Witneſs that is one of good fame and credit, and yet by Rules of the Law, he may not be a Witneſs in the Cauſe, wherein he is produced to give his teſtimony. *Paſc. 23. Car. B. r. For he may be for ſome by reſpect not indifferent in that particular cauſe, though otherwiſe accounted of good credit and repute.*

One that is made Executor of a Will, is not to be allowed as a Witneſs to prove that Will. *Paſc. 23 Car. B. r. For his own intereſt may be concerned in the proof of the Will, in reſpect of the ſurpluſage of the Teſtators eſtate which the Law caſts upon him after the Debts and Legacies of the Teſtators be paid, if there be any ſuch ſurpluſage.*

If the Councel on both ſides at a Tryal cannot agree what teſtimony a Witneſs examined in the

Cauſe

Cauſe did give, the Court will examine him again. *Paſc.* 23. *Car. B. r. That all things given in evidence may be left clear and without diſpute unto the Jury to conſider of.*

Inhabitants within a Corporation, if they be not free of the Corporation, may be admitted as Witneſſes for the Corporation, at a Tryal which concerns the Corporation. *Paſc.* 23. *Car. B. r. For their intereſt is no way concerned, and favour is not a good exception againſt a Witneſs, although it be againſt a Juror, becauſe the teſtimony of a Witneſs is left to the Jury to credit or not to credit as they ſhall find cauſe, and ſo it is not binding to the Jury; but the Juries Verdict, be it true or falſe, is binding to the party, and therefore there is greater caution to be uſed, that they may be indifferent, and not partial.*

A Witneſs may not be compelled to anſwer upon a *voir dire* touching a Treſpaſs done, for the doing whereof he may himſelf be liable to an Action. *Mich.* 23. *Car. B. r.* For *nemo tenetur prodere ſeipſum; for it is againſt the very Law of Nature, and therefore it ſeems the tendring of the Oath* ex officio *is not warrantable, which Oath is prohibited by* Stat. 17. Car. *to be adminiſtred.*

One that is of Councel in the Cauſe on one ſide, may be examined as a Witneſs in it on the other ſide, if he be ſerved with Proceſs to give his teſtimony therein, but otherwiſe he may refuſe to be examined. *Mich.* 23. *Car. B. r. For in the former caſe he is enjoyned by Law to do it, which is to be preferred before his Clyent, but otherwiſe it is a voluntary act, and it is not civil for him to do it, nor is he to be preſſed unto it.*

The Examinations of Witneſſes which were taken

ken *in perpetuam rei memoriam*, ought not to be made uſe of at a Tryal, until the Witneſſes ſo examined be dead. *Hill.* 23. *Car. B. r. Paſc.* 24. *Car. B. r.* 19. *Ap. For they were only examined for their teſtimonies to be preſerved, and to be made uſe of only in caſe they ſhould dye before the Tryal.*

One that is any ways concerned in the ſame Title of the Land in queſtion, may not be allowed as a Witneſs in the cauſe, although he be no ways then a party to the Suit. *Paſc.* 24. *Car. B. r. For his teſtimony tends to the corroboration of his own Title, and therefore ſhall not be preſumed to be indifferent.*

One that claims any benefit by a Deed, may not be allowed as a Witneſs to prove the Deed. *Mich.* 1649. *B. r. In regard of his intereſt.*

One that is to be a Witneſs at a Tryal, ought not to be examined before the Tryal, but by conſent of both parties. *Hill.* 1649. *B. S. And in ſuch caſes where he cannot conveniently be had at the Tryal.*

The Court will upon a motion grant a *Habeas Corpus* to have a priſoner in priſon upon an Execution in the Mareſchal See, to be at a Tryal to be examined as a Witneſs, if the Tryal be in *London*; but he that obtains the *Habeas Corpus* muſt carry him thither, and bring him back at his own charge and peril, that he make no eſcape. *Trin.* 1650. *B. S.* 29. *Jun.* Q. Tamen, *Whether it ought to be done where the priſoner is in Execution, in which caſe the priſoner ought to be in* arcta cuſtodia *at the Suit of the party.*

If a Witneſs be ſick, ſo that he cannot be at a tryal, and it is ſo proved by Affidavit, and that Witneſs hath been formerly examined upon intergatories in the *Chancery* in that matter upon which he is to be

examined

examined upon at the Tryal, the intergatory may be admitted to be read in evidence to the Jury at the Tryal. 1652. *B. S. That the party may not have cauſe to complain that he wanted his evidence.*

One that hath been burnt in the hand for a Felony committed by him, and be pardoned for the Felony, may be admitted as a Witneſs in a cauſe. By *Rolle* Chief Juſtice. 1652. *B. S. For by the pardon his offence is pardoned, and he is made* rectus in curia; *for the pardon doth pardon as well the offence it ſelf as the guilt of it.*

In the Caſe of one *Williams* and *Pues. Paſc.* 1656. *B. S.* Upon a motion it was ſaid by *Glyn* Chief Juſtice, that one whom the Plaintiff makes a Defendant in the Suit, on purpoſe to take away his teſtimony, may be examined as a Witneſs in that cauſe *de bene eſſe*; and if the Plaintiff do prove no cauſe of Action againſt him, his teſtimony is to be allowed for good evidence in the cauſe.

Upon evidence given at a Tryal at the Bar between *Warren* a common Carrier and the Hundred of *Broad-water*, upon the Statute of *Winchester*, of Hue and Crys, it was ſaid by *Glyn* Chief Juſtice, that a Carrier who is robbed, may be examined as a Witneſs at a Tryal touching that robbery, to prove the robbery, and what he was robbed of, otherwiſe the truth cannot be known. But he ſaid, that this is the only caſe where one may be admitted to give his teſtimony as a Witneſs in a matter which concerns himſelf; and in this caſe the Carrier was examined accordingly. Nota. *Mich.* 1656. *B. S.*

In the Caſe of *Meridith* againſt the Hundred of *Warlington* in *Surrey*. *Paſc.* 1657. It was ſaid by *Glyn* Chief Juſtice, that a Pariſhioner is not a competent

tent Witneſs to prove the Bounds of a Pariſh where he is an Inhabitant, although he pay neither Scot nor Lot, but receives Alms of the Pariſh, becauſe he is ſubject to watch and ward, and ſo is concerned ſomething, though not ſo much as others of greater abilities.

Will.

A *Codicil* may be added by *Paroll* unto a Will in writing, and this *Paroll Codicil* ſhall be put in writing, and affixed to the Will, as a *Codicil*: This may as well be done as a Will in writing may be revoked by *Paroll*, as it may well be. *Hill.* 22. *Car. B. r. Paſc.* 23. *Car. B.* . *And this* Codicil *is a Will in writing ſufficient to bequeath Lands according to the Statute of Wills.*

A Will which doth only concern the bequeathing of Lands, *&c.* ought to be proved in the *Chancery*; but if it be a mixt Will, and doth concern Lands, Goods, and Chattels alſo, it may be proved in the ſpiritual Court. *Hill.* 22. *Car. B. r.* Q. *Whether the practice be ſo now.* *Sir Sa. Car. 166. a will of Lands not proved*

The probate of a Will *per teſtes* is no corroboration of the Will. *Hill.* 22. *Car. B. r. Although the common opinion is otherwiſe; for if it come in queſtion at the Law, whether a Will or no Will, it is no evidence to a Jury to prove it a Will, becauſe it was proved* per teſtes; *but the Will reſts as much upon proof as if it had been proved in common form, for the Law takes no notice of Witneſſes examined in the ſpiritual Court.*

A Will in writing is a good Will to convey Lands, although the Will be not ſealed. *Paſc.* 23. *Car. B. r. For the Statute of* 32 H. 8. *that enables to convey Lands by Will, ſpeaks nothing of ſealing, but only of writing*

writing ſuch Wills, and the Will declares the mind of the Teſtator, as well by the writing, as if it were ſealed.

If the Teſtator make his Will by Paroll, and do give direction to put his words in writing, which is done in his life time accordingly; this is a good Will to convey Lands, although he do not afterward declare that writing to be his Will during his life; but if his words were not put in writing till after his death, it is not a good Will within the Statute to convey Lands. *Paſc. 24. Car. B. For it was not his Will in writing, during his life, as it muſt be to convey Lands. But in the former Caſe it was becauſe the words were written in his life time.*

If the Teſtator do make his Will by Paroll, which is afterwards put by another in writing by his direction, and there is more expreſſed in the writing, then the Teſtator did expreſs by Paroll, yet the Will in writing is good, as to ſo much of it as can be proved was expreſſed by Paroll. *Paſc. 24. Car. B. r. For ſo much of it was the Teſtators Will, and what is expreſſed more, ſhall be only void, and ſhall not vitiate the reſt.*

If a Will be made by Paroll, and it is afterwards put in writing, and the writing is embezeled, loſt, or deſtroyed; yet is not the Will thereby deſtroyed, if it can be proved by Witneſſes. *Paſc. 24. B. r. For the Paper is not the mind or will of the Teſtator, but only a Declaration and Manifeſtation what his mind and will was; and if that can be made appear any other ways, it ſufficeth to prove he made ſuch a Will.*

A Will by which Lands are conveyed, ought not to be kept in the Prerogative Office, for it doth properly belong to the Legatee of the Lands to ſupport

his Title at the Common Law by, if he be queſtioned for the Lands, and is part of his evidence, and therefore it is reaſon he ſhould have the cuſtody of it. *Mich.* 1649. *But they may take a Copy of it, and enter it into their* Leiger *Book, as they uſe to do.*

The Teſtator may, if he be at that time of *ſane memorye*, deſire another perſon to ſet his hand and ſeal to his Will for him; and if he do it, the Will is a good Will, though the Teſtator did it not himſelf. *Paſc.* 1650. *Miii* 5. *For it would have been good, though no hand and ſeal had at all been ſet to it.*

If one make his Will in his ſickneſs by the over opportunity of his wife, to the intent he may be at quiet, and not vexed and troubled by her; ſuch a Will ſhall be adjudged to be made by conſtraint, and is not a good Will. By *Rolle* Chief. Juſtice, in the caſe of one *Hacher* and *Newborne* tryed at the Bar. *Mich.* 1654. *B. r.* Q. Tamen. *For* Voluntas non poteſt cogi, *and it differs from the Caſes of making of a Deed by Menace or Dureſs, as me ſeems.*

FINIS.